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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

RONALD DECKER, EILEEN GLATHER, DORIS KING, ROGER MONIA, KENNETH ROBERTSON, ORLA ZABRISKIE, FRANCES H. ERICKSON, and a CLASS of Similarly Situated Individuals (defined hereinafter),

Plaintiffs,

vs.

UTAH DEPARTMENT OF TRANSPORTATION; JOHN R. NJORD, Executive Director, UDOT, in his official capacity,

Defendants.

FINDINGS OF FACT AND PRELIMINARY ORDER APPROVING STIPULATED SETTLEMENT

Case No. 1:01CV0020 B

The parties have entered into a Stipulated Settlement and have submitted a Joint Motion and Stipulation to Approve the Stipulated Settlement. A hearing was held on the 14th day of August, 2006 to consider that motion. Based on the evidence submitted, the arguments of counsel, and for good cause shown, the court enters the following Finding of Facts and Preliminary Order Approving the Stipulated Settlement:

Findings of Fact

1. Plaintiffs class representatives and Defendant, UDOT, have agreed to the terms contained in the Stipulated Settlement.

2. The Stipulated Settlement has been approved by the Utah State Legislature.

3. The provisions of the Stipulated Settlement are fair, reasonable, and adequate.

4. The method of notice to the class members outlined in the Stipulated Settlement is the best practical notice under the circumstances.

5. The Notice of Settlement to Class Members filed with this court meets the requirements of Rule 23(c)(2)(B).

Order

Based on the foregoing Findings of Fact and for good cause otherwise appearing, **IT IS HEREBY ORDERED:**

1. The Stipulated Settlement is given preliminarily approval, the terms of which are set forth below.

2. Notice shall be given as set forth in the Stipulated Settlement.

3. A hearing for granting final approval of the Stipulated Settlement shall be held on the 19th day of October 2006. , 1:00 p.m.,

The following terms of the Stipulated Settlement are preliminarily approved:

Introduction and Jurisdiction

1. The Federal District Court has subject matter jurisdiction over the underlying claims asserted herein because they arise under federal law, and the Federal District Court has subject matter jurisdiction to enforce the terms of this Stipulation of Settlement entered into to remedy violations of federal law as detailed below.

2. The Defendant hereby knowingly and intentionally waives any 11th Amendment and other sovereign immunity with respect to this case that might otherwise limit the prospective injunctive relief sought by this lawsuit and stipulated to in the Stipulation of Settlement. This knowing and intentional waiver of 11th Amendment immunity is made with full knowledge that the legal scope and breadth of 11th Amendment immunity are being litigated frequently and may be redefined by court opinions during the life of the Stipulation of Settlement. Notwithstanding this knowledge, the Defendant's knowing and intentional 11th Amendment immunity waiver is made to resolve this litigation and to further the best interests of the Plaintiffs, the Plaintiff Class, the Defendant, and the State of Utah. This waiver is strictly limited to this Stipulation of Settlement and the State reserves all other rights to assert the waiver when applicable.

3. As a result of this Stipulation of Settlement and UDOT waiving its Eleventh Amendment immunity rights, the parties agree that Defendant John Njord, UDOT's Executive Director, may be dismissed from this action as a party Defendant, with prejudice.

4. This Stipulation of Settlement does not operate as an adjudication upon the merits of the litigation.

5. The Federal District Court shall enter an order approving the terms of this agreement and stipulation as required by F.R.Civ.P. 23(e)(1)(A).

6. The Federal District Court shall retain jurisdiction to enforce the specific terms of this Stipulation of Settlement as detailed below. Defendant UDOT will be liable for and carry out any enforcement order entered by the Court that it does not appeal.

7. Pursuant to F.R.Civ. P. 23(b)(2) the Plaintiff Class consists of all Utah residents who use wheelchairs for ambulation and for whom curbs without adequate ramps may be barriers to accessibility to either streets or pedestrian walkways.

Definitions

8. "§ 504," as used herein, refers to the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated pursuant to § 504. The parties acknowledge and the court has held that § 504 incorporates the substantive terms of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, and regulations promulgated pursuant to the ADA insofar as the ADA pertains to curb ramps.

9. "Roadway," as used herein, means every length of street, road and highway that constitutes a part of the state highway system, independent of whether said roadway lies within a municipality, unincorporated areas of a county, federally owned or controlled land, Indian Reservation, public park, regardless of the controlling jurisdiction, etc., that were deemed a part of the state highway system as of the date this lawsuit was filed, and any roadways added to the state highway system, and excluding any roadways deleted from the state highway system, pursuant to Utah Code, 72-4-101 *et seq.*, from that date through and including the life of this Stipulation of Settlement.

10. "ADAAG," as used herein, references the Americans with Disabilities Act Access Guidelines as set forth in 28 C.F.R. Pt. 36, App. A.

11. "Curb ramp," as used herein, means a short ramp cutting through a curb or built up to it, as defined in ADAAG, Sec. 3.5.

12. An "ADAAG compliant" curb ramp, as used herein, means a curb ramp that complies with each and every measure and specification set forth in ADAAG, Sec. 4.7, and all ADAAG sections, standards, and guides referenced therein and in effect at the specific point in time when a curb ramp was or is to be constructed. The parties agree and stipulate that "ADAAG compliant" curb ramps include curb ramps that meet ADAAG standards at the time of construction. The parties expressly agree and intend that already existing curb ramps constructed to ADAAG standards in effect at the time of construction will continue to be considered ADAAG compliant until such time that a subsequent construction project which

brings about an alteration of the existing roadway that renders the curb ramp noncompliant with the ADAAG standards in existence at the time the roadway was altered.

13. "Sidewalk," as used herein, means an exterior pathway with a prepared surface intended for pedestrian use. *See* ADAAG, Sec. 3.5 ("walk," defined).

14. "Alteration," as used herein, includes, new construction, widening of existing roads, reconstruction of existing pavement, rehabilitation of existing pavement, non/structural/thin bituminous overlay, open graded surface course, micro-surfacing, lane-leveling, rotomilling, a double chip seal, and other treatments that are 3/4" thick or more. Additionally, any treatments which together result in a build up of more than 3/4" shall be considered an alteration at the time the treatment is done that results in the build up of more than 3/4".

15. The "UDOT Representative," or "Defendant's Representative" as used herein will be a person designated by the Defendant and identified by name, title, email address, work mailing address and work phone number, who will function as set forth below at all times during the life of the Stipulation of Settlement. If at any time the UDOT Representative is unwilling or unable to continue serving in that capacity, the Defendant will promptly designate a replacement UDOT Representative.

16. The "Plaintiffs' Representative," as used herein, is the designated protection and advocacy agency for the State of Utah.

Intent and Substantive, Enforceable Terms

17. The Defendant will give notice of this Stipulation of Settlement to class members by publishing a notice in all Utah papers of daily circulation once a week for four consecutive weeks. The Defendant shall pay all costs associated with this notice.

18. The terms of the Stipulation of Settlement are fully implemented when: all highways, roads and streets that are part of the state highway system and other roads, streets and highways at the points at which they intersect the State Highway System have curb ramps that meet all ADAAG requirements and standards current at the time of construction or alteration, as outlined in paragraph 19.

19. UDOT will complete work on the nonexistent curb ramps identified in the survey, explained *infra* at paragraph 23, at a rate of approximately 30% every three years. Thus, 30% of the curbs identified in the survey shall be completed within the first three (3) years of the period beginning with the Court's approval of this Stipulation of Settlement, and the entry of an order consistent with its terms, 60% by the end of six (6) years, 90 % at the end of nine (9) years, and 100% by the end of ten (10) years. Roads added to the State Highway System in the last two years of the term of this Stipulation shall be given an additional two years to be made ADAAG compliant. Should any roadways be removed from the State Highway System before the completion of the terms of this Settlement Agreement the Defendants obligations under this agreement regarding those roadways will be extinguished.

It is understood that extenuating circumstances may cause periodic interruptions of this schedule. Such extenuating circumstances include, but are not limited to, the following:

(a) Roads subject to other jurisdictions, particularly Indian Reservations, which may preclude UDOT from doing construction work, including installation of curb ramps pursuant to this Stipulation; and

(b) Property subject to eminent domain proceedings by UDOT, which may be subject to another court's jurisdiction.

(c) Where compliance with applicable provisions is technically infeasible, the alteration shall comply to the maximum extent feasible.

20. Anytime during the duration of this stipulated settlement, the Plaintiffs, any class member, the Plaintiffs' Representative, or any other individual can make a complaint to UDOT or the UDOT Representative regarding an existing curb ramp where the transition from the lip of gutter to the pavement surface is more than 0.5 inches. UDOT's Representative will ensure that the appropriate UDOT Region will correct the identified problem within ninety (90) days from the date of the complaint and check all curb ramps associated with the same project as the curb ramp complained of and ensure that the same UDOT region fix as necessary. If the number of complaints exceeds UDOT's capacity to investigate the complaints and remedy them within ninety (90) days, it will notify Plaintiffs' Representative and submit to it a plan stating how it plans to address these complaints over a specific period of time.

21. In an effort to resolve the contested issues of law and fact involved in this action the parties agree that the terms of paragraphs 18, 19, and 20 are a means of complying with the requirements of § 504 pertaining to curb ramps.

22. Defendant must strictly implement the terms of paragraphs 18, 19, 20, and 24 absent an agreement by the parties to a modification or a modification by this Court of the Order Approving Stipulation of Settlement based upon impossibility of performance arising from factors that are outside UDOT's control.

23. The parties agree that UDOT shall be released in part or in full from the commitment to install curb ramps or other sloped areas under this Stipulation consistent with the occurrence of one or more of the following events:

(a) Congress repeals or amends those provisions of § 504 of the Rehabilitation Act, upon which Plaintiffs rely in maintaining that UDOT must install curb ramps or other sloped areas whenever and wherever it alters state roads;

(b) The United States Department of Justice amends or repeals its regulations so that the obligation, as alleged by Plaintiffs, of public entities such as UDOT, to install curb ramps or other sloped areas whenever and wherever it alters roads or highways has been eliminated or modified;

(c) The United States Supreme Court or the United States Court of Appeals for the Tenth Circuit rules that public entities such as UDOT are not required by the ADA or § 504 of the Rehabilitation Act or its regulations to install curb ramps or other sloped areas whenever and wherever it alters roads or highways.

UDOT shall only be released in part or in full from the commitment to install curb ramps or other sloped areas under this Stipulation only as it directly relates to the changes in law as

outlined above. Such changes in the law shall not apply retroactively unless the law so specifies.

24. Within six (6) months of the date the Stipulation of Settlement is approved by the Court and an Order consistent with the terms of the Stipulation of Settlement is entered by the court clerk, the Defendant will complete a survey of all intersections on and along state roadways where sidewalk access along the state roadway or crossing the state roadway is affected by no curb ramp and will provide Plaintiffs' representative a copy of said survey. Because this survey will constitute a working document and tool aimed to facilitate the effective implementation of the terms of this agreement, the Defendant shall exercise best efforts to ensure the survey covers all state roadways and intersections therewith, and that the results of the survey are accurate.

25. The parties agree and stipulate that the Defendant's best efforts to timely complete the survey pursuant to the immediately foregoing terms is required by § 504 as part of the self-evaluation process and as an amendment to any previously completed self-evaluations required by § 504 and that a failure to timely complete the survey with best efforts to ensure full coverage of all state roadways and accuracy of the survey constitutes a violation of § 504.

26. Defendant's and Plaintiffs' representatives will use the survey to ascertain the location of nonexistent curb ramps and to ensure that they are made compliant within the stated time frames.

27. The UDOT Representative will provide to the Plaintiffs' representative an annual report following the end of the federal fiscal year containing the following information:

(a) All projects contracted during the previous fiscal year indicating which of those projects involved the alteration of pavement as defined by paragraph 14;

(b) Which of those projects included installation or upgrade of curb ramps to ADAAG standards;

(c) Upgrade of UDOT survey showing all locations where curb ramps were installed or upgraded during previous fiscal year;

(d) All projects planned for construction during next fiscal year, where alteration of pavement is anticipated; and

(e) A list of all complaints received during the previous fiscal year involving the transition from the lip of gutter to the pavement surface, and the resolution to those complaints.

The report will identify the location of each curb ramp installed or otherwise altered during the previous fiscal year. The annual report should be provided within 90 days of the end of each federal fiscal year, until each location on the original survey of intersections, as referenced in paragraph 23 above, has been addressed and has an ADAAG compliant curb ramp as defined in paragraph 12 above. The life of this Stipulation of Settlement begins as of the date approved by the Court and an Order Approving Stipulation of Settlement is entered by the court clerk and ends when the court determines that each location on the original survey and all roadways added as defined within paragraph 9 are completed pursuant to the terms of paragraph 19 above. Any roadways deleted from the state highway system are to be excluded.

28. The following provision defines how proceedings to enforce the Stipulation of Settlement may proceed.

(a) If Defendant fails to produce a complete survey at the end of the six months, or if disputes arise about the contents of the survey, the parties will meet and confer in an attempt to resolve the conflict. This meeting will be scheduled within thirty (30) days of notice given that conflict exists, and can be at the request of either party. If this meeting fails to resolve the issues for which the meeting was convened, the matter shall be heard by an arbitrator, chosen by both parties, and paid for by the Defendant. The decision of the arbitrator shall be binding.

(b) If it appears based on the annual report, or from visual inspection of locations identified in the annual report, that UDOT has failed to comply with the requirements of this Stipulation of Settlement for the previous year at any location, Plaintiffs will contact UDOT, giving notification of the location(s) as soon as possible, but no later than six months of the end of the issuance of the annual report. UDOT will make corrections as appropriate and will notify the Plaintiffs' representative in writing of any corrections made as a result of the notification.

(c) In the event that Defendant fails to meet the requirements of paragraphs 18, 19, or 20 above, or as outlined in subsection (b) of this paragraph, at the end of each three year period after the entry of the Order Approving Stipulation of Settlement, Plaintiffs may demand of Defendant in writing that it present to Plaintiffs' representatives

a written plan by which it will timely correct its failure to meet the requirements outlined in paragraphs 18, 19, and 20 above, and subpart (b) of this paragraph. If Defendant does not present to Plaintiffs' representatives within 60 days of receipt of a written request to timely correct compliance failures outlined in this subparagraph, or Plaintiffs' conclude that the plan is inadequate, Plaintiffs may file a Motion for an Order compelling Defendant to comply with the provisions of paragraph 18, 19, and 20 and subpart (b) of this paragraph. If the court finds that the Defendant has failed to meet its obligations under the terms of Order Approving Stipulation of Settlement, the Court will order all appropriate remedies to compel full compliance with the Order.

29. The Defendant knowingly and intentionally waives any claim that compliance with the Order Approving Stipulation of Settlement constitutes an undue burden or that compliance with the Order Approving Stipulation of Settlement constitutes a fundamental alteration of any program related thereto.

Reservation of Rights

30. The parties hereby agree and stipulate that the Order Approving Stipulation of Settlement shall not operate as a bar to Plaintiffs or Plaintiff Class members filing separate actions regarding the failure of Defendant to correct noncompliant or nonexistent curb ramps. By entering into this agreement and stipulation, the Defendant does not waive any claim, right or defense to any lawsuit filed separately from this lawsuit.

31. During the term of this Stipulation of Settlement, Plaintiffs' counsel and the Disability Law Center agree not to represent any Plaintiff in any other action against Defendant involving the issue of non-existent curb ramps outside of the terms of this Stipulation of Settlement.

Attorney Fees and Costs

32. The parties agree and stipulate that, for purposes of § 504 and 42 U.S.C. § 1988, the Plaintiffs are "prevailing parties" in this litigation and that federal law requires that the Defendant pay the Plaintiffs' costs and also attorney fees reasonably incurred up to and including the date the Stipulation of Settlement is approved by the Court and an Order Approving Stipulation of Settlement entered by the court clerk. These fees currently are estimated at $70,000. Those attorney fees incurred by the Plaintiffs for the discrete task of opposing the Defendant's motions to dismiss the Plaintiffs' ADA claims should not be awarded. The parties acknowledge that some legal research and briefing was performed for the joint purpose of opposing the Defendant's motions to dismiss the Plaintiffs' ADA claims and opposing the Defendant's motions to dismiss the Plaintiffs' § 504 claims. The parties should attempt in good faith to reach a stipulation as to a reasonable award of costs and attorney fees pursuant to the foregoing. If the parties are not able to reach a stipulation with regard to calculation and payment of costs and reasonable attorney fees, counsel for Plaintiffs may file a petition for attorney fees, which may be supported by evidence and briefed by the parties separately from proceedings related to the Stipulation of Settlement, and adjudicated by the court pursuant to the

foregoing terms for the limited purpose of determining the reasonableness of the amount Plaintiffs claim as fees and ordering the Defendant to pay those fees that it ultimately finds as reasonable, with neither party waiving a right to appeal.

33. If proceedings are brought before this court to enforce the Order Approving Stipulation of Settlement, the Plaintiffs should be awarded their reasonable attorney fees and costs if and to the extent they are deemed prevailing parties. If and to the extent the Defendant is deemed the prevailing party on any such enforcement action, then as is consistent with 42 U.S.C. § 1988 and judicial interpretation thereof, the Defendant should be awarded its attorney fees only if the Plaintiffs are deemed to have instituted enforcement proceedings for the purpose of harassing the Defendant or that said proceedings are frivolous and without an arguable legal basis.

Severability, Waiver and Amendment

34. Should any clause of this agreement and the Order Approving Stipulation of Settlement be declared unenforceable by a court of competent jurisdiction, the unaffected terms should remain enforceable and should be interpreted so as to carry out the parties' intent as defined above.

35. Should either party fail to exercise a right otherwise available herein, said failure should not operate or be construed as a waiver of said right or other rights associated therewith.

36. No act or verbal agreement should be construed as amending this agreement or the Order Approving Stipulation of Settlement. The terms of the Order Approving Stipulation of Settlement may only be modified by the court.

Legislative Approval

37. It is understood by the parties that this Stipulation of Settlement is subject to the provisions of § 63-38(b)-301 et. seq., Utah Code, requiring approval of the settlement of this action by the Governor and the Legislature. In the 2005 General Session, the Governor and the Legislature approved the settlement in accordance with that law (Senate Concurrent Resolution 5).

Dated this 14th day of August, 2006.

Dee Benson
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

BILL BRANDEN SPITLER, Plaintiff, OGDEN CITY CORPORATION; JUSTON DICKSON; and SHAWN GROGAN, Defendants.	**ORDER GRANTING PLAINTIFF'S MOTION FOR EXTENSION OF TIME** Case No. 1:03 CV 00119 PCG Judge: Paul G. Cassell

This matter comes before the court on the parties' stipulated request to extend time for the plaintiff, Bill Spitler, to file a response to the defendants' Motion for Summary Judgment. The court grants the plaintiff an extension. The plaintiff shall file and serve the response on or before August 21, 2006.

SO ORDERED.

DATED this 15th day of August, 2006.

Paul Cassell
JUDGE PAUL G. CASSELL

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SALT LAKE CITY WEEKLY, et al., Plaintiffs, vs. CAPT. KIM CHESHIRE, et al., Defendants.	Case No. 1:05CV032 TS ORDER STRIKING HEARING The Honorable Judge Ted Stewart Magistrate Judge Brooke C. Wells

In light of the recently filed Motion to Compel and Motion for Protective Order, the court hereby STRIKES the hearing scheduled for August 16, 2006. All pending motions before this court[1] will be heard on September 28, 2006 at 10:00 a.m. following briefing by the parties.

IT IS SO ORDERED.

DATED this 15th day of August, 2006.

Brooke C. Wells
United States Magistrate Judge

[1] Before this court are motion numbers 17, 28, 40, 42, 44, and 46. Judge Stewart or Judge Campbell will decide the motion to consolidate.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH CENTRAL DIVISION

REBECCA LEIGH DEHART, Plaintiff, vs. STEVENS-HENAGER COLLEGE, INC., Defendant.	**PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION** **Consolidated Case No. 1:05CV00118** **Judge Paul G. Cassell**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. STEVENS-HENAGER COLLEGE, INC. Defendant.	

This matter having come before the Court pursuant to the agreement of the parties, and good cause being shown, the Court ORDERS that the following procedures shall be used in this

action for the protection of the parties against the improper disclosure or use of confidential information produced in discovery or filed with the Court:

1. CONFIDENTIAL RESTRICTION.

A. The parties may designate as "Confidential" any documents that refer, reflect, or relate to (1) any personal information about any current or former employees of defendant Stevens-Henager College, Inc. ("Stevens-Henager") including, but not limited to, dates of birth, social security numbers, contact/location information, and medical information, (2) any requests for a workplace accommodation for any disability or impairment by any former or current Stevens-Henager employees, (3) the discipline, commendation, or job performance of any former or current Stevens-Henager employees; and (4) the involuntary termination of any former or current Stevens-Henager employees.

B. Information designated "Confidential" may be used only in connection with this litigation, and not for any other purpose. Such information may not be disclosed to anyone except as provided in this Order.

C. Any documents stamped "Confidential" as well as any copies or excerpts thereof, or analyses or reports which pertain thereto, may be made available only to:

i. Attorneys of record for the parties, their employees and other attorneys and/or employees of their firms;

ii. Judges, law clerks and other clerical personnel of the Court before which this action is pending;

iii. Experts who agree to abide by the terms of this Order;

iv. The parties to this litigation and their officers, directors or employees (if any) on a need to know basis.

v. Trial or deposition witnesses, subject to the provisions of Paragraph 2(d), below.

D. Any document or evidence filed with the Court or submitted to the Judge which is designated as containing "Confidential" information will be filed in a sealed envelope or other appropriate container, marked on the outside with the title of the action, and a statement substantially in the following form:

CONFIDENTIAL

This document is subject to a PROTECTIVE ORDER issued by the Court and may not be examined or copied except in compliance with that Order.

2. DEPOSITIONS.

A. If "Confidential" information is marked as a deposition exhibit, such exhibit shall retain its designated status and, if filed, shall be filed under seal.

B. During any deposition, counsel for the Producing Party may request that any portions of the deposition or deposition exhibits also be treated as "Confidential." The presence of persons not entitled to attend a deposition pursuant to this paragraph shall constitute justification for counsel for the Producing Party to advise or instruct the witness not to answer.

C. Upon receipt, all deposition transcripts and the exhibits thereto shall be treated initially as "Confidential" in their entirety until fifteen (15) days after receipt of the transcript, unless the parties expressly agree otherwise. Within fifteen (15) days after receipt of the transcript, any party may designate portions of a deposition transcript as "Confidential." The

designation shall be accomplished by a letter to all other parties and the court reporter listing the pages, lines, and exhibits constituting confidential information and the category of confidentiality. If the Producing Party previously designated portions of testimony as "Confidential" during the deposition, the Producing Party is not required to redesignate those portions of the transcript during the fifteen (15) day period unless the Producing Party wants to change the designation.

D. Documents and any other materials containing "Confidential" information may be shown to a witness to examine or cross-examine the witness during a deposition or trial. A witness may view such materials in advance of the deposition or trial if the witness agrees to abide by the terms of this Order. However, a witness shall not retain any such documents or things or any copies thereof after the deposition or trial (except for the purpose of reviewing the transcript of his or her deposition in connection with its correction or execution), unless the witness is otherwise authorized under this Order to receive such information.

3. OBJECTION TO DESIGNATION.

A. If, at any time during the preparation for trial or during the trial of this action, a party believes that another party has unreasonably designated certain information as "Confidential," or believes that it is necessary to disclose designated information to persons other than those permitted by this Order, and the designating party does not agree to change the designation or to the further disclosure, the party may make an appropriate application to this Court requesting that the specifically identified documents, information, and/or deposition testimony be excluded from the provisions of this Order or be made available to specified other persons.

B. This Order will not prejudice the right of any party to oppose production of any information on the ground of attorney-client privilege, work product immunity, or any other protection provided under the law.

DATED this 3rd of August, 2006

VANCOTT, BAGLEY, CORNWALL & MCCARTHY

Gabrielle Lee Caruso
Attorneys for Defendant Stevens-Henager

DATED: 8/3/06

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sandra J. Padegimas
Attorneys for Plaintiff EEOC

DATED: 8/3/06

STRINDBERG, SCHOLNICK & CHAMNESS, LLC

John Benson
Erica Birch
Attorneys for Plaintiff Rebecca Dehart

IT IS SO ORDERED.

DATED: AUG. 15, 2006

Judge ~~The~~ Paul G. Cassell
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA **Plaintiff,** **MICHAEL H. BIGHAM** **Defendant**	**ORDER FOR PSYCHOSEXUAL EXAMINATION & TESTING** **1:06-CR-00007-001-TC**

It appears that psychosexual examination and testing of the defendant is necessary in order that a more complete presentence report may be prepared pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.

IT IS THEREFORE ORDERED that the defendant submit to an examination conducted by a qualified practitioner as directed by the Probation Office to provide information to the Court pursuant to 5 U.S.C. § 3109.

IT IS FURTHER ORDERED that investigative information may be released to the provider for purposes of testing and evaluation.

IT IS FURTHER ORDERED that the United States Probation Office shall pay all reasonable and necessary expenses from funds allocated for such purposes.

DATED this 9 day of august, 2006.

BY THE COURT:

Tena Campbell

Tena Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RUBEN ALVARADO NAVA, Defendant.	**ORDER TO CONTINUE JURY TRIAL** Case No. 1:06CR00047TC-

Based on the motion to continue trial filed by Defendant in the above-entitled case, and good cause appearing,

It is hereby ORDERED that the trial scheduled for August 14, 2006, is hereby continued to the 16th day of October, 2006, at 8:30 a.m. Pursuant to 18 U.S.C. § 3161(h), the Court finds the ends of justice served by such a continuance outweigh the best interests of the public and the defendant in a speedy trial. Accordingly, the time between the date of this order and the new trial date set forth in paragraph one above is excluded from speedy trial computation.

DATED this 7th day of Aug, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Court Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

TRUGREEN COMPANIES, L.L.C., a Delaware limited liability company, and TRUGREEN LIMITED PARTNERSHIP, a Delaware limited partnership, Plaintiffs, vs. KEVIN D. BITTON d/b/a SCOTTS LAWN SERVICE et al., Defendants.	ORDER EXTENDING TIME TO SERVE ANSWER TO AMENDED COMPLAINT Case No. 1:06-CV-00024 PGC

This matter comes before the court pursuant to a stipulated request to extend the time for the defendants, Mower Brothers, Inc., Scotts Lawn Service, Greenside, LLC, Kevin D. Bitton and Jean Robert Babilis, Ryan Mantz, Lary Gaythwaite, Jim LeBlanc, David Stephensen, Jason Hiller, James Clogston, Rick Deerfield, and David Van Acker (collectively, the defendants), to serve an answer to the plaintiffs' amended complaint. The defendants' motion [#125] is APPROVED. The defendants shall file and serve their responsive pleadings on or before August 21, 2006.

When seeking any future extensions, counsel for the defendants is reminded to explain the cause, as required by the rules.[1]

SO ORDERED.

DATED this 14th day of August, 2006.

Paul G. Cassell
United States District Judge

[1]*See* Fed. R. Civ. P. 6(b); D.U. Civ. 7-1(b)(1).

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

AVOCET MEDICAL IMAGING INC., a Utah corporation, Plaintiff, vs. ALTIUS HEALTH PLANS, INC., a Utah corporation, Defendant.	ORDER AND MEMORANDUM DECISION Case No. 1:06 CV 41

Plaintiff Avocet Medical Imaging Inc. filed this lawsuit in the Box Elder County Justice Court, Small Claims Department, seeking payment for medical imaging services it provided to two individuals that are beneficiaries under health plans administered by Defendant Altius Health Plans, Inc. About one month after the suit was filed, Altius filed a Notice of Removal claiming that jurisdiction in this court was proper because Avocet's claims are preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.

Avocet has filed a motion to remand this matter to the state court, arguing that ERISA preemption is only applicable when plan participants or their beneficiaries seek to recover or rectify a wrongful denial of benefits. According to Avocet, it is neither a plan participant nor a beneficiary of a plan participant, but rather is a "physician-hospital health care provider." (Memo. of Auth., Mot. to Remand 3 (dkt. #6).) Avocet's argument is unavailing and its motion to remand must be denied.

Analysis

The United States Code provides that the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The United States Code also allows actions originally filed in state court to be removed to a federal court, "[w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action . . . ." Id. § 1441(c). In such a circumstance, "the entire case may be removed." Id.

Arguing in support of removal of this case, Altius asserts that this court has original jurisdiction over Avocet's attempt to recover payment for the medical imaging services provided to an individual whose initials are L.M. The parties agree that L.M. was enrolled in a benefits plan governed by ERISA. (See Memo. of Auth., Mot. to Remand 4-5 (dkt. #6); Def.'s Memo. of Points and Auths. in Opp'n to Plf.'s Mot. to Remand 5 (dkt. #8).) It is also beyond dispute that ERISA allows a plan participant to bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). ERISA expressly supercedes state law causes of action and requires a plan participant pursuing relief to file the action in federal court. See id. § 1144. The preemptive effect of ERISA is "expansive" and is "intended to ensure that employee benefit plan regulation [is] 'exclusively a federal concern.'" Aetna Health Inc. v. Davila, 542 U.S. 200, 207 (2004) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

A review of the Avocet's complaint reveals that this is an action to recover benefits due under the terms of L.M.'s ERISA-governed plan. (See Small Claims Aff. & Order 3, attached as

Ex. 1 to Notice of Removal (dkt. #1) (L.M. "was provided MRI service on July 17th 2005. The claim for $1,397 was filed with Altius on January 5th 2006 and was wrongfully and in bad faith denied on February 1st, 2006.").) The fact that Avocet is pursuing this suit as an assignee of L.M. does not alter the fundamental nature of the claim. In fact, such assignments are routine and desirable because "they allow health care providers to serve patients without first screening for solvency, and save patients from paying potentially crippling medical bills while awaiting reimbursement." Simon v. Cyrus Amax Minerals Health Care Plan, 107 F. Supp, 2d 1263, 1265 (D. Colo. 2000).

Avocet's contention that Aetna somehow categorically excludes health care providers from ERISA's preclusive effects has no merit. In fact, Aetna involved suits brought by individual plan participants and, as a result, there was no need for the Court to consider whether ERISA's preemption provision extended to claims brought by an assignee of a plan participant's claims. Accordingly, Avocet's reliance on Aetna is misplaced.

Avocet, as an assignee, seeks to enforce the terms of an ERISA-governed benefits plan. Because this court has original jurisdiction over that claim, this case was properly removed from state court. Accordingly, Plaintiff's Motion to Remand, and Assess Costs and Fees is DENIED.

SO ORDERED this 14th day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

AO 240A (Rev. 12/03)

UNITED STATES DISTRICT COURT

Northern Division **District of** UTAH

Laurie A. Love

Plaintiff

V.

Jo Anne Barnhart,
Commissioner Social Security Administration

Defendant

ORDER ON APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES

Judge Tena Campbell
DECK TYPE: Civil
DATE STAMP: 08/15/2006 @ 13:42:50
CASE NUMBER: 1:06CV00093 TC

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:

☒ GRANTED.

☒ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this 15th day of August, 2006.

Signature of Judge

Magistrate Judge Samuel Alba
Name and Title of Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE PROCTER & GAMBLE COMPANY and THE PROCTER & GAMBLE DISTRIBUTING COMPANY, **Plaintiffs,** **vs.** **RANDY L. HAUGEN, et al.,** **Defendants.**	**ORDER GRANTING JOINT MOTION FOR EXTENSION OF TIME TO FILE REBUTTAL EXPERT REPORTS** **Case No. 1:95-cv-00094-TS-PMW** **Judge Ted Stewart** **Magistrate Judge Paul M. Warner**

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Ted Stewart pursuant to 28 U.S.C. § 636(b)(1)(A). Before the court is the parties' joint motion for an extension of time for The Procter & Gamble Company and The Procter & Gamble Distributing Company ("Plaintiffs") to file their rebuttal expert reports. Based upon the stipulation of the parties and good cause appearing therefor, the motion is GRANTED. Plaintiffs shall have up to and including August 28, 2006, to file their rebuttal expert reports.

DATED this 15th day of August, 2006.

BY THE COURT:

PAUL M. WARNER
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KURTIS R. ANDERSEN, Defendant.	ORDER Case No. 2:01 CR 158 TC

Before the court is defendant Kurtis R. Andersen's Motion for Early Termination of Supervised Release. The court having reviewed the motion and having verified the information with the United States Probation Office, and good cause appearing,

IT IS HEREBY ORDERED THAT defendant's motion is GRANTED.

DATED this 14 day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

BERNICE I. CORMAN (*Pro hac vice*)
ERIC G. WILLIAMS (#3484)
MARK ELMER (*Pro hac vice*)
Trial Attorneys, Environmental Enforcement Section
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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. MAGNESIUM CORPORATION OF AMERICA, *et al.*, *Defendants.*	Case No. 2:01CV0040B **ORDER GRANTING EXTENSION OF TIME** Judge Dee Benson Magistrate Judge Donald O. Nuffer

Based upon the stipulation of Plaintiff United States and Defendant US Magnesium LLC, and good cause appearing therefore, IT IS HEREBY ORDERED that the Court's July 22, 2006 Order (docket no. 290) be amended. Plaintiff United States may have an extension of time, up to and including August 15, 2006, to submit its Response to Defendant US Magnesium's Motion for Partial Summary Judgment.

DATED this 15th day of August, 2006

Dee Benson

Honorable Dee Benson
United States District Court Judge

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER SETTING CONDITIONS OF RELEASE

JUSTIN PETERSON

Case Number: 2:03-CR-821 TC

IT IS SO ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local or tribal law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed

as directed. The defendant shall next appear at (if blank, to be notified) _____
PLACE

_____ on _____
DATE AND TIME

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of

_____ dollars ($) _____

in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and state) (Tel.No.)
who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____
Custodian or Proxy

(✔)(7) The defendant shall:
( ) (a) maintain or actively seek employment.
( ) (b) maintain or commence an educational program.
(✔)(c) abide by the following restrictions on his personal associations, place of abode, or travel:
maintain residence at Cornell Community Corrections Center under 24 hour supervision.

( ) (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses:

(✔)(e) report on a regular basis to the supervising officer as directed.
( ) (f) comply with the following curfew:
( ) (g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
( ) (h) refrain from excessive use of alcohol.
( ) (i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C.§802 unless prescribed by a licensed medical practitioner.
(✔)(j) undergo medical or psychiatric treatment and/or remain in an institution, as follows: take all medications as prescribed and as directed by USPO. After 2-4 weeks (as found appropriate by USPO), to attend mental health classes. USPO to provide a report to the Court prior to recommending mental health treatment.

( ) (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property

( ) (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:

( ) (m) execute a bail bond with solvent sureties in the amount of $
( ) (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of) _____ o'clock for employment, schooling or the following limited purpose(s):

( ) (o) surrender any passport to
( ) (p) obtain no passport
( ) (q) the defendant will submit to drug/alcohol testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment, if deemed advisable by supervising officer.
( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
( ) (s) submit to an electronic monitoring program as directed by the supervising officer.
( ) (t)

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a $250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment and a $250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness. victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years of more, you shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both;
(2) an offense punishable by imprisonment for a tem of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;
(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both.
(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in additions to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release , to appear as directed , and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

Signature of Defendant

Address

City and State Telephone

Directions to the United States Marshal

(✔)) The defendant is ORDERED released after processing.

( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: August 15, 2006

Signature of Judicial Officer

Magistrate Judge David Nuffer

Name and Title of Judicial Officer

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LEONARD G. MILLER, Plaintiff, vs. CITY OF TOOELE, et al. Defendants.	AMENDED ORDER & MEMORANDUM DECISION Case No. 2:03-CV-397 TC

Plaintiff Leonard G. Miller filed this action under 42 U.S.C. § 1983 against Defendants City of Tooele, Tooele City Police Department, Sargent Roger C. Niesporek, Detective Todd M. Hewitt, and Lieutenant Craig Wexels. Mr. Miller, who was arrested, charged, and ultimately convicted in state court of conspiracy to distribute a controlled substance, claims that he suffered multiple violations of his constitutional rights during the course of the criminal investigation and the subsequent prosecution. Additionally, Mr. Miller alleges that Sargent Niesporek and Detective Hewitt engaged in a conspiracy to deprive him of his civil rights under 42 U.S.C. § 1985(2). Mr. Miller also asserts a state law claim against Sargent Niesporek and Detective Hewitt for intentional infliction of emotional distress.

In an order dated July 27, 2005, the court addressed the majority of Mr. Miller's claims. Intervening authority from the United States Supreme Court, as well as the submission of additional motions related to Mr. Miller's underlying claims, cause the court to now issue this Amended Order & Memorandum Decision. For the reasons set forth more fully below, the court

grants Defendants summary judgment on all claims raised by Mr. Miller with one exception. Defendants are not entitled to summary judgment on Mr. Miller's claim that his Fourth Amendment rights were violated when law enforcement searched his home after completing a protective sweep, but before the arrival of a search warrant.

ANALYSIS[1]

Legal Standards

Summary Judgment

Federal Rule of Civil Procedure 56 permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The court must "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Qualified Immunity

The qualified immunity doctrine "protects public officials performing discretionary functions unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Johnson v. Martin, 195 F.3d 1208, 1216 (10th Cir. 1999) (internal citations omitted). When a claim of qualified immunity is raised in the context of a motion for summary judgment, the court, viewing the evidence in a light most

[1]The factual background of this case is set forth at length in the written submissions of the parties. The court will repeat only those facts necessary to explain its decision.

favorable to the nonmoving party, must first determine whether the plaintiff has sufficiently asserted the violation of a constitutional right. Mimics, Inc. v. Village of Angel Fire, 394 F.3d 836, 841 (10th Cir. 2005). Then, if the plaintiff has done so, the court must determine whether the asserted right was clearly established at the time the defendant acted. Id. at 841-42.

"When evaluating a qualified immunity defense, after identifying the constitutional right allegedly violated, courts must determine whether the conduct was objectively reasonable in light of clearly established law at the time it took place." Pierce v. Gilchrist, 359 F.3d 1279, 1297 (10th Cir. 2004) (emphasis added). "Requiring the law to be clearly established provides defendants with 'fair warning' that their conduct is unconstitutional." Mimics, 394 F.3d at 842 (quoting Hope v. Pelzer, 536 U.S. 730, 739-40 (2002)). "The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains." Roska v. Peterson, 328 F.3d 1230, 1248 (10th Cir. 2003). To determine whether a constitutional right is clearly established, the Supreme Court recently noted, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent." Hope, 536 U.S. at 739 (emphasis added). Put another way, the inquiry is "whether the law put officials on fair notice that the described conduct was unconstitutional." Pierce, 359 F.3d at 1298 (emphasis added).

Importantly, the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 343 (1986) (citing Harlow v. Fitzgerald, 475 U.S. 800 (1982)). A

showing of negligence, even if it is gross negligence, is not sufficient to establish liability under 42 U.S.C. § 1983. Johnson, 195 F.3d at 1219.

Even on summary judgment, Mr. Miller bears the burden of establishing that the Defendants violated a constitutional right. See Jantz v. Muci, 976 F.2d 623, 627 (10th Cir. 1992) ("A defendant government official need only raise the qualified immunity defense to shift the summary judgment burden to the plaintiff.").

Fourth Amendment: Search and Seizure

Mr. Miller asserts that Detective Hewitt and Sargent Niesporek violated his Fourth Amendment rights based on two distinct actions: (1) the officers' initial entry into his residence after Mr. Miller discovered the presence of a police informant, and (2) the officers' re-entry into and occupation of Mr. Miller's residence while the officers awaited the arrival of a search warrant. Mr. Miller also alleges that officers impermissibly conducted a search of his premises--following a protective sweep--while waiting for the arrival of the search warrant.

1. Initial Entry Into Mr. Miller's Home

Sargent Niesporek and Detective Hewitt used Kevin Reeder as an informant to arrange a purchase of illegal narcotics from Mr. Miller. After arranging the sale by telephone, the officers drove Mr. Reeder to Mr. Miller's residence and sent him in with $30.00 of police money to complete the transaction. Mr. Reeder wore a wire allowing the officers to monitor and record the transaction as it occurred. Detective Hewitt and Sargent Niesporek remained in their car near Mr. Miller's residence to monitor the transaction.

While listening to the conversation between Mr. Miller and Mr. Reeder, the officers heard a woman's voice. The woman was later identified as Misty Woods. After hearing Ms. Woods's voice, the officers saw a woman walk past their car. They then heard Ms. Woods tell Mr. Miller

that Sargent Niesporek was sitting in a car nearby. The officers left the area and parked in a new location slightly farther from Mr. Miller's residence.

From their new location the officers heard Mr. Miller accuse Mr. Reeder of being an informant. Mr. Miller instructed Mr. Reeder to open his jacket so that Mr. Miller could see if Mr. Reeder was wearing a wire. Mr. Reeder refused. The officers heard Mr. Miller, who discovered the wire despite Mr. Reeder's refusal to cooperate, order Mr. Reeder out of his residence. Mr. Reeder refused to leave. The officers then drove back to Mr. Miller's residence.

When they arrived, Detective Hewitt and Sargent Niesporek arrested Mr. Miller, who was on the porch at the time. The officers entered Mr. Miller's home without a warrant or consent and conducted a protective sweep. They located Mr. Reeder and Ms. Woods and placed them in handcuffs. Mr. Miller was later brought inside the residence and the three individuals were detained in the front room.

Mr. Miller argues that his Fourth Amendment rights were violated by the officers' entry into his home. Citing Kirk v. Louisiana, 536 U.S. 635, 638 (2002), Detective Hewitt and Sargent Niesporek have responded that their warrantless entry into Mr. Miller's home was justified by exigent circumstances. According to Detective Hewitt and Sargent Niesporek, Mr. Miller's discovery that Mr. Reeder was working with the police caused them to fear for Mr. Reeder's safety and justified their entry into Mr. Miller's home. The officers maintain that they entered Mr. Miller's home to perform a protective sweep because they knew Mr. Reeder was inside and because they suspected Ms. Woods was also present.

The court agrees that the officers' need to assure the safety of Mr. Reeder and to protect themselves from occupants (known and unknown)of Mr. Miller's residence constituted exigent circumstances that justified their entrance into Mr. Miller's residence. Mr. Miller correctly

points out that the police may not create exigent circumstances to allow the warrantless entry into a person's home. See United States v. Flowers, 336 F.3d 1222, 1230 (10th Cir. 2003). But there is no evidence to demonstrate that the exigency present in this case was, in fact, created by Detective Hewitt and Sargent Niesporek. Mr. Miller asserts that the officers directed Mr. Reeder to refuse to leave the residence in order to create an exigency and justify the entrance into Mr. Miller's residence. But there is simply no evidence in the record to support this theory. Accordingly, Sargent Niesporek and Detective Hewitt are entitled to qualified immunity on the issue of the initial entry into Mr. Miller's residence.

2. Re-entry Into Mr. Miller's Home After Arrest

Mr. Miller, Mr. Reeder, and Ms. Woods were detained while the officers waited for a warrant to search Mr. Miller's home. After arresting Mr. Miller, the officers took him back inside his home, where he joined Mr. Reeder and Ms. Woods, but Mr. Miller "did not give the officers permission or consent at any time for them to enter my home." (Affidavit of Leonard G. Miller ("Miller Aff.") ¶ 4, attached as Ex. 1 to Plf.'s Memo. Opp'n. Mot. Summ. J. (dkt. #32).)

In his deposition, Detective Hewitt explained that Mr. Miller and Ms. Woods were detained inside the residence to "maintain the integrity of that house so that we could say nobody else had entered or exited the house." (Deposition of Todd Hewitt, Nov. 7, 2005, 55:25-56:3, attached as Ex. 7 to Plf.'s Resp. in Opp'n to Mot. for Summ. J. (dkt. #96).) When asked if the officers considered detaining Mr. Miller and Ms. Woods outside the residence until a search warrant arrived, Detective Hewitt responded: "Originally that had been discussed, I believe, but it was raining. It was pouring. We didn't want to stick them outside of the house. They were more comfortable in their home. It was heated, [had] places for them to sit, things of that nature." (Id. at 56:9-13.)

Mr. Miller, in his affidavit, states that while being detained in his home: "I watched Defendants search my home and touch my personal property without my consent and before any search warrant was issued or presented to me." (Miller Aff. ¶ 6.) Mr. Miller further states: "Det. Hewitt left my home with Kevin Reeder. Sgt. Niesporek produced a plate and a straw making some reference to meth. I told him it was sodium or salt from which I had been eating french fries. Sgt. Niesporek was handling the plate and straw long before he had a warrant." (Id. at ¶ 13.) During his deposition, Mr. Miller elaborated:

> [I saw Sargent] Niesporek bringing items out of my bedroom such as a plate and straw, moving ceramic figurines, looking under them, kind of looking at them, looking behind things, lifting up the skirting on my couch, looking under my couch, moving cushions around on my couch, kind of picking them up and looking under the cushions.

(Deposition of Leonard Miller, Sept. 29, 2005, 45:8-14, attached as Ex. 2 to Defs.' Memo. in Supp. of Mot. to Dismiss, or for Summ. J. (dkt. #83).)

Mr. Miller argues that the officers' re-entry into his home after he had been arrested and the search conducted by officers after the protective sweep but before the arrival of the search warrant violated his Fourth Amendment rights. Defendants respond that even if the re-entry and alleged search were improper under the Fourth Amendment, the voluntary suppression during the criminal proceedings of evidence obtained during the detention and search suffices to purge all impropriety. The court disagrees. While suppression of the evidence could bear on the question of damages, it does not affect the analysis of whether the officers violated Mr. Miller's Fourth Amendment rights.

Turning first to the question of the re-entry into Mr. Miller's residence. Ample case law supports the proposition that officers can remain inside a residence while waiting for a search warrant. See Segura v. United States, 468 U.S. 796, 798 (1984) (no Fourth Amendment

violation when officers entered premises with probable cause and the "preserve[d] the status quo [for nineteen hours] while others, in good faith, [were] in the process of obtaining a warrant."); United States v. Martinez, No. 05-00087-CR-3-RV-001, 2006 WL 2034648, at *3 (11th Cir. July 21, 2006) ("The officers entered the residence, made sure that no one was hiding who could have destroyed any evidence, and watched the residents until a search warrant arrived. Seizure of a residence to prevent the destruction of evidence while waiting for a warrant does not constitute an illegal search under the Fourth Amendment."); United States v. Amburn, 412 F.3d 909, 913 (8th Cir. 2005) (no constitutional violation claimed when officers, "[d]ue to cold weather, . . . decided to wait inside the house" for a warrant to arrive); United States v. Fortgang, 77 Fed. Appx. 37, 38 (2nd Cir. 2003) ("Fortgang also challenges the suppression ruling, arguing that when law enforcement officials entered his house . . . they violated the Fourth Amendment by waiting inside with the occupants of the house, until a search warrant was obtained several hours later. We disagree."); United States v. Ruiz-Estrada, 312 F.3d 398, 404 (8th Cir. 2002) ("The district court's finding that the officers acted reasonably in securing the apartment while awaiting a search warrant was not clearly erroneous. . . . Officers secured the apartment to prevent the destruction of a suspected narcotics supply. The act of securing the apartment while awaiting a search warrant comports with the Fourth Amendment." (citing United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997) (no Fourth Amendment violation when officers secured a hotel room until obtaining a search warrant)); United States v. Taylor, 248 F.3d 506, 513 (6th Cir. 2001) ("Once an officer has probable cause to believe contraband is present, he must obtain a search warrant before he can proceed to search the premises. However, the Supreme Court has held that because evidence may be removed or destroyed before a warrant can be obtained, an officer does not violate the Fourth Amendment by securing the area to be searched and waiting

until a warrant is obtained." (citing Segura v. United States, 468 U.S. 796, 810 (1984)) (internal citation omitted)). Here, the officers suspected Mr. Miller of distributing controlled substances. It was constitutionally permissible for the officers to remain on the premises and maintain the status quo while waiting for a search warrant to issue.

There is, however, a critical difference between securing and searching. As noted in Taylor, absent exigent circumstances, a search warrant is required before officers are allowed to search secured premises. 248 F.3d at 513. In this case, Defendants do not deny Mr. Miller's accusations that officers continued to search Mr. Miller's residence after the initial protective sweep and before the arrival of the search warrant. Defendants argue that no true damage was caused by this "second search" because all the harms Mr. Miller claims he has suffered in this case flowed from his initial arrest alone. While Defendants' arguments may be relevant to a determination of the damages Mr. Miller should receive in light of the impermissible second search, they do not change the reality that the violation of constitutional rights is itself a compensable harm. It may be that Mr. Miller is ultimately only able to recover nominal damages for the constitutional violation occasioned by the second search, but Defendants are not entitled to summary judgment on that claim.

Fourth Amendment: Malicious Prosecution

Mr. Miller has asserted a claim for malicious prosecution based on the criminal prosecution and conviction resulting from his April 26, 2002 arrest. The State of Utah initiated the prosecution of Mr. Miller with the filing of an Information on April 30, 2002. The Information initially contained three counts: (1) possession of a controlled substance, (2) conspiracy to distribute a controlled substance, and (3) possession of drug paraphernalia. The two possession charges were dropped, but Mr. Miller was eventually convicted by a jury on the

remaining conspiracy charge.

The Tenth Circuit recognizes a cause of action under § 1983 for malicious prosecution, but the court has made clear that such a claim is not the same as a claim for the state law tort of malicious prosecution. In Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004), the court noted that in a § 1983 claim the "'ultimate question' is the existence of a constitutional violation." Id. at 1290 (citations omitted). Importantly, the court found that a plaintiff need not satisfy "the requirements of an analogous common law tort" to state an actionable claim for malicious prosecution under § 1983. Id.

Despite Mr. Miller's allegations of improper conduct by the officers in this case, the trial court found on several occasions that the prosecution of Mr. Miller was adequately supported by probable cause. Evidence obtained as the result of a possible constitutional violation was suppressed by stipulation and not used at trial. The fact that Mr. Miller was convicted by a jury on the charge of conspiracy to distribute a controlled substance lends further credence to the conclusion that there was not a constitutional violation to support a claim of malicious prosecution under § 1983. Defendants are entitled to summary judgment on that claim.

First Amendment: Retaliatory Prosecution

Mr. Miller also asserts a claim of retaliatory prosecution based on a settlement reached with Detective Hewitt and Sargent Niesporek in an earlier civil rights lawsuit.

On April 27, 1998, Detective Hewitt and Sargent Niesporek entered Mr. Miller's home, took him outside and arrested him for public intoxication and disorderly conduct. The charges were eventually dismissed because of the warrantless entry into Mr. Miller's home. Mr. Miller, along with his sister and mother, filed a lawsuit against Sargent Niesporek and Detective Hewitt under 42 U.S.C. § 1983 based upon the officers' entry into Mr. Miller's home and the subsequent

prosecution. In October of 2000, the parties settled and the case was dismissed. Mr. Miller asserts that his April 26, 2002 arrest was orchestrated by the Defendants to initiate a retaliatory criminal prosecution in violation of the First Amendment.

Mr. Miller argues that Detective Hewitt and Sargent Niesporek recruited Mr. Reeder as an informant with the specific purpose of investigating and prosecuting Mr. Miller. Mr. Reeder testified at his deposition that the officers were the ones who suggested setting up a controlled drug buy with Mr. Miller: "I can't say whether it was Niesporek or whether it was that parole officer. I don't remember which one it was that first come up with [Mr. Miller's] name." (Deposition of Kevin Reeder, Mar. 17, 2003, 19:13-16, attached as Ex. 2 to Plf.'s Memo. Opp'n. Mot. Summ. J.) Mr. Reeder also testified that it was the officers who dialed Mr. Miller's telephone number. (Id. at 18:22.).

The Tenth Circuit has long recognized claims for retaliatory or vindictive prosecution, noting: "Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." Poole v. County of Otero, 271 F.3d 955, 960 (10th Cir. 2001) (quoting Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001)); see also Wolford v. Lasater, 78 F.3d 484, 488 (10th Cir. 1996); Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995). "In the context of a government prosecution, a decision to prosecute which is motivated by desire to discourage protected speech or expression violates First Amendment and is actionable under § 1983." Wolford, 78 F.3d at 488.

On Defendants' motion, the court stayed this case pending the United States Supreme Court's decision in Hartman v. Moore, 126 S. Ct. 1695 (2006). That decision has now issued and Defendants have filed a motion for summary judgment on Mr. Miller's retaliatory

prosecution claim on the basis of the Harman decision. Hartman imposes a duty on a plaintiff in a retaliatory prosecution case to plead and prove that the challenged prosecution was not supported by probable cause. See id. at 1707 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven.").[2]

The parties agree that Hartman imposes a requirement on Mr. Miller to establish that his state prosecution was not supported by probable cause and the court agrees with the parties' assessment. The application of Hartman to this case should be a straightforward matter considering that Mr. Miller was bound over for trial and ultimately convicted of the charged offense. But Mr. Miller contends that, despite the initiation and outcome of his criminal trial, he should be allowed, in this civil proceeding, to establish that his state prosecution was not supported by probable cause.

Mr. Miller justifies his attack on the state court's probable cause determination by arguing that exculpatory evidence was destroyed by Defendants and that the presence and consideration of the destroyed evidence would have undercut the existence of probable cause in the state court criminal proceeding. Specifically, Mr. Miller claims that Defendants destroyed a tape recording that would have established that Mr. Miller refused to sell drugs to Mr. Reeder

[2]Defendants, through their motion, sought alternative relief of either dismissal of or summary judgment on Mr. Miller's retaliatory prosecution claim. Defendants' presumably premise their request for dismissal on the theory that Mr. Miller was required to plead that his underlying state prosecution was not supported by probable cause. But a review of the Complaint reveals that Mr. Miller adequately asserted a lack of probable cause. (See Plf.'s Response in Opp'n to Def.'s Mot. to Dismiss/for Summ. J. iii-iv (listing examples of lack of probable cause allegations).) Accordingly, the court addresses Defendants' motion as one seeking summary judgment.

despite Mr. Reeder's repeated requests that he do so.

Any argument that Defendants destroyed exculpatory evidence, or that probable cause did not support the state proceedings against Mr. Miller, goes to the heart of the validity of Mr. Miller's state conviction. If Mr. Miller successfully established the probable cause was lacking in the state proceedings, that showing that would undoubtedly call into question the validity of the jury's determination that Mr. Miller was guilty beyond a reasonable doubt. As stated in Heck v. Humphrey, 512 U.S. 477, 486 (1994), "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . ." While Mr. Miller may argue that his state prosecution was not supported by probable cause, he must make that argument before the state court. Accordingly, Defendants are granted summary judgment on Mr. Miller's retaliatory prosecution claim.

Fourteenth Amendment: Alleged Destruction of Evidence

Mr. Miller alleges that Detective Hewitt and Sargent Niesporek violated his due process rights under the Fourteenth Amendment through the spoliation of evidence.

As discussed above, Mr. Reeder was wearing a wire and radio transmitter in Mr. Miller's home. The device used was on loan from the Grantsville City Police Department. During the course of Mr. Miller's criminal prosecution, his counsel sought to review the tape recording of the conversation that occurred within Mr. Miller's residence and was told that the tape was blank. During Mr. Miller's criminal proceedings, the trial judge concluded that the evidence had not been destroyed, but allowed Mr. Miller's counsel to conduct depositions of all witnesses regarding the content of the conversation that the officers had attempted to record.

Mr. Miller asserts that Detective Hewitt and Sargent Niesporek intentionally destroyed

the tape recording, which he contends contained exculpatory evidence. According to Mr. Miller, that spoliation of evidence violates his rights under the Due Process Clause of the Fourteenth Amendment. Several courts, including the Tenth Circuit, "have recognized that police officers can be liable under the Due Process Clause, pursuant to § 1983, for withholding exculpatory evidence." Pierce v. Gilchrist, 359 F.3d 1279, 1293 (10th Cir. 2004); see also Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001); Jean v. Collins, 221 F.3d 656 (4th Cir. 2000) (en banc); Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999).

The state court considered the argument now advanced by Mr. Miller and concluded that no constitutional violation occurred. But Mr. Miller claims that there is new evidence before this court that the state court did not have the benefit of reviewing and that his cause of action should be allowed to proceed. The "new evidence" that Mr. Miller points to is his own deposition testimony. Mr. Miller claims that he was "practically" foreclosed and "essentially compelled" to sit silently during the criminal trial and could not testify about what happened the night of his arrest. Mr. Miller was not compelled to remain silent during his criminal trial; he chose to remain silent. His reliance on the allegedly destroyed evidence in this action is nothing more than an impermissible collateral attack on his state court conviction. If there is, in fact, "new evidence" supporting Mr. Miller's claim that the tapes were illegally erased, the proper course would be for Mr. Miller to supply the state court with that evidence. See Heck, 512 U.S. at 486 ("[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . .").

Conspiracy Under 42 U.S.C. § 1985

Mr. Miller claims that Sargent Niesporek and Detective Hewitt conspired to violate his

civil rights in violation of 42 U.S.C. § 1985(2). There is nothing in the record that supports a claim under that statute. Mr. Miller alleges, without well-founded support, that Sargent Niesporek and Detective Hewitt conspired to destroy exculpatory evidence in violation of his due process rights under the Fourteenth Amendment and thereby interfered with the court proceedings in his criminal prosecution. As discussed, the state court concluded that no constitutional violation occurred in connection with the alleged destruction of evidence. Any attempt to subvert that ruling in this proceeding would amount to an impermissible collateral attack. Defendants are granted summary judgment on Mr. Miller's conspiracy claim.

Intentional Infliction of Emotional Distress

In order to succeed on a state law claim of intentional infliction of emotional distress, Mr. Miller must demonstrate:

> (i) the [defendant's] conduct [complained of] was outrageous and intolerable in that it offended ... generally accepted standards of decency and morality; (ii) [the defendant] intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress; (iii) [the plaintiff] suffered severe emotional distress; and (iv) [the defendant's] conduct proximately caused [the] emotional distress.

Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 535-36 (Utah 1992) (quoting Retherford v. AT&T Comm. of the Mountain States, Inc., 844 P.2d 949, 970-71 (Utah 1992)) (alterations in original). The conduct of which a plaintiff complains must evoke "outrage or revulsion; it must be more than unreasonable, unkind or unfair." Prince, 56 P.3d at 536 (quotations omitted). Conduct is not outrageous only because it is "tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal." Id.

Here, Mr. Miller has alleged an actionable violation of his constitutional rights based upon the officers' impermissible "second search" of his home. The court recognizes that all constitutional violations are of grave importance, but, as a matter of law, finds that Mr. Miller

has not alleged facts sufficient to maintain a claim for intentional infliction of emotional distress.

City of Tooele, Tooele City Police Department, and Lieutenant Wexels

Mr. Miller has not submitted any evidence in support of his claims against the City of Tooele, the Tooele City Police Department, or Lieutenant Wexels. In their written submissions to the court, Defendants argue that no constitutional violation occurred and that, therefore, there is no basis for establishing municipal or supervisory liability in this case. But, as discussed, Defendants have not successfully argued that the "second search" of Mr. Miller's residence was constitutionally permissible. Nevertheless, Mr. Miller has submitted no evidence that supports his claims against the municipal defendants or Lieutenant Wexels. In fact, Mr. Miller's brief opposing Defendants' request for summary judgment does not even mention those defendants. "[S]ummary judgment is appropriate unless the nonmoving party makes a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Champagne Metals v. Ken-Mac Metals, Inc., Nos. 04-6222, 05-6139, 2006 WL 2244644, * 6 (10th Cir. Aug. 7, 2006) (internal quotation and brackets omitted). No such showing has been made here and, therefore, the City of Tooele, the Tooele City Police Department, and Lieutenant Wexels are entitled to summary judgment on all claims against them.

Pending Motions

Given the court's rulings in this order, all pending motions in limine are denied without prejudice. Additionally, all other pending motions are denied as moot. Counsel are free to re-file any motions that they feel still warrant the attention of the court in spite of the issuance of this Amended Order and Memorandum Decision.

ORDER

For the reasons set forth above:

1. Motion for Summary Judgment of Defendants' Sargent Roger Niesporek and Detective Todd Hewitt (dkt. #25) is DENIED insofar as that motion seeks summary judgment on Mr. Miller's claim that officers illegally searched his residence after the protective sweep but before the arrival of a search warrant. The motion is GRANTED on all other issues.
2. Plaintiff's Motions in Limine Nos. 1, 2 & 3 (dkt. #44) are DENIED without prejudice.
3. Joint Stipulation Regarding Extension of Fact Discovery Deadlines to Depose Roger Niesporek and Craig Wexels (dkt. #52) is DENIED as moot.
4. Plaintiff's Motion in Limine No. 4 (dkt. #54) is DENIED without prejudice.
5. Plaintiff's Motions in Limine Nos. 5, 6 and 7 (dkt. #66) are DENIED without prejudice.
6. Defendants' Motion in Limine to Exclude Evidence Related to the Cassette Tape and Surveillance Equipment (dkt. #73) is DENIED without prejudice.
7. Defendants' Motion to Dismiss All Remaining Claims, or in the Alternative, Motion for Summary Judgment (dkt. #88) is DENIED insofar as that motion seeks summary judgment on Mr. Miller's claim that officers illegally searched his residence after the protective sweep but before the arrival of a search warrant. The motion is GRANTED on all other issues.
8. Motion to Strike Plaintiff's Recently Named Witnesses or in the Alternative to Continue Trial Date (dkt. #90) is DENIED as moot.

9. Plaintiff's Motion to Revise Prior Order Dismissing Second Cause of Action for Constitutional Injury Due to Destruction of Exculpatory Evidence and Reinstating Claim Due to Discovery of New Evidence (dkt. #93) is DENIED.

10. Plaintiff's Motion for Summary Judgment on Issue of Illegal Re-Entry (dkt. #94) is DENIED.

SO ORDERED this 14th day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

Alan L. Sullivan (3152)
Matthew L. Lalli (6105)
James D. Gardner (8798)
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Attorneys for Defendants Attorneys' Title Insurance Fund and Attorneys' Title Insurance Fund, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MARK D. ALBRIGHT, et al.,

Plaintiffs,

v.

ATTORNEYS' TITLE GUARANTY FUND, INC., et al.,

Defendants.

ORDER REGARDING THE FLORIDA FUND'S MOTION FOR PROTECTIVE ORDER AND MOTION TO COMPEL

Case No. 2:03CV00517

Honorable Dee V. Benson
Magistrate Judge Samuel Alba

This matter came before the Court on May 17, 2006 for hearing and oral argument on Defendants Attorneys' Title Insurance Fund and Attorneys' Title Insurance Fund, Inc.'s (collectively "the Florida Fund") (1) Motion for Protective Order and (2) Motion to Compel. The Florida Fund was represented by Matthew L. Lalli and James D. Gardner. Plaintiffs were represented by George M. Haley and Daniel W. Jackson. Defendants Cohen Fox P.A., Robert A. Cohen, and Michele S. Primeau (collectively, the "Cohen Fox defendants") were represented by

Gregory J. Sanders and Stephen D. Kelson.

Having considered the Motion, the parties' memoranda, attachments directed to the Motion, heard oral argument, and issued an oral ruling from the bench on May 17, 2006,

IT IS HEREBY ORDERED THAT:

1. The Florida Fund's Motion for Protective Order is granted. The plaintiffs are prohibited from seeking in discovery documents related to Cohen Fox defendants' representation of the Florida Fund in matters unrelated to Attorneys Title Guaranty Fund, Inc. and the Utah defalcations at issue in this case, including matters in Minnesota. The Plaintiffs, however, are not prohibited from questioning the Cohen Fox defendants regarding their general representation of the Florida Fund in matters unconnected to Attorneys Title Guaranty Fund, Inc. and the Utah defalcations at issue in this case.

2. The Florida Fund's Motion to Compel is granted in part and denied in part. On or before June 16, 2006, in response to Interrogatory No. 5 of its First Set, Plaintiffs' counsel is directed to provide a letter detailing the theory of liability and the factual support for each cause of action the plaintiffs' intend to pursue at trial and a list of the causes of action they intend to abandon. As to each cause of action, the letter will provide the legal basis for imputing liability upon the Fund. If the Florida Fund is not satisfied with the information received, they may seek further relief from the Court. Also, on or before June 16, 2006, Plaintiffs' counsel is directed to inform the court either that it has located plaintiff Nancy Hill and has provided discovery responses from Nancy Hill, or Plaintiffs' counsel is directed to file a motion to withdraw as her counsel.

3. The Florida Fund's Motion to Compel on its Second Set of Interrogatories, on its

request for verifications for its Second Set of Interrogatories, and on its First Set of Document Requests is Denied.

DATED this 3rd day of May 2006.

BY THE COURT:

Magistrate Judge Samuel Alba

APPROVED AS TO FORM:

HOLME ROBERTS & OWEN L.L.P.

George M. Haley
Jay D. Gurmankin
Chris R. Hogle
Richard D. Flint

SNELL & WILMER L.L.P.

Alan L. Sullivan
Mathew L. Lalli
James D. Gardner

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of June, 2006, true and accurate copies of the foregoing were sent to the following via electronic filing, by United States mail, postage prepaid, or by hand-delivery:

George M. Haley
Holme Roberts & Owen LLP
229 S. Main Street, Suite 1800
Salt Lake City, UT 84111-2263

Gregory J. Sanders
Stephen D. Kelson
Kipp and Christian, P.C.
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Daniel W. Jackson
2157 Lincoln Street
Salt Lake City, UT 84106

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Main Street Financial
2358 South Main Street
Salt Lake City, UT 84115

CALLISTER NEBEKER & McCULLOUGH
CASS C. BUTLER (4202)
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10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 530-7300
Facsimile: (801) 364-9127

Attorneys for Utah Receiver, Douglas Hawkes

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LEHMAN BROTHERS BANK, FSB, Plaintiff, vs. BEVERLY HILLS ESTATES FUNDING, INC., et al., Defendant.	**THIRD ORDER APPROVING DISTRIBUTIONS, AMENDMENT OF EXHIBIT A, AND MOTION FOR ATTORNEYS FEES AND COSTS** Civil No. 2:03-CV-00612 PGC Judge Paul G. Cassell

Before the court are the Utah Receiver's Third Motion to Amend/Correct Exhibit A [#116] and Third Motion for Attorneys Fees and Costs [#118], filed August 7, 2006. The Motions have been unopposed.

After receiving the submissions by the Utah Receiver, and after considering the Utah Receiver's Status Report of August 7, 2006 [Docket No. 119], and being fully advised,

IT IS HEREBY ORDERED,

1. Exhibit "A" is amended to include Floy Harley, Dennis Simpson and Bryan Rust, as additional beneficiaries as set forth in the version dated August 7, 2006, submitted by the Utah Receiver. The individuals listed in the amended Exhibit "A" dated August 7, 2006, are deemed to be the legitimate and lawful beneficiaries of the Trust and shall be entitled to a proration of any distribution from the Trust in the percentage amounts listed in Exhibit "A".

2. The Utah Receiver is directed to distribute $26,575.05 to Floy Harley, $7,229.57 to Dennis Simpson, and $4,191.06 to Bryan Rust, from the Trust corpus, to bring these beneficiaries current with the pro rata distribution made previously to the other beneficiaries on Exhibit "A". The Utah Receiver shall make such distributions forthwith and shall advise the Court of any distributions which are non-deliverable or checks which are not cashed by the designated recipient.

3. The Receiver's Third Application for Award of Fees and Costs dated August 7, 2006, is approved for payment from the Trust in the amount of $11,442.46 to Hansen Barnett & Maxwell, and $20,928.90 to Callister Nebeker & McCullough.

4. The court GRANTS the Utah Receiver's Third Motion to Amend/Correct Exhibit A [#116] and Third Motion for Attorneys Fees and Costs [#118]. Exhibit A is hereby amended by the attached Exhibit.

DATED this 14th day of August, 2006.

BY THE COURT:

PAUL G. CASSELL
U.S. DISTRICT JUDGE

EXHIBIT A

Exhibit A

Revised August 7, 2006

NAME	ADDRESS	CITY, STATE	ZIP	PHONE	Net Loss on Investment	Percent of Total Net Loss
Changed Claims:						
HARLEY, FLOY					$ 422,726.27	1.6627%
RUST, BRYAN	REDACTED				66,666.72	0.2622%
SIMPSON, DENNIS					115,000.00	0.4523%
TOTAL CHANGED CLAIMS					$ 604,392.99	
Unchanged Claims:						
ALVARADO, JESUS					$ 39,200.04	0.1542%
ANDERSON, DALE					2,799.85	0.0110%
ANDERSON, RANAE E.					10,000.00	0.0393%
ANDERSON, TED					186,319.00	0.7328%
ANDERSON, WADE					8,320.00	0.0327%
AUSTIN, MARK R.					112,223.49	0.4414%
BALLING, RICK					22,000.00	0.0865%
BARNES, DALE M.					128,787.37	0.5065%
BINGHAM, DAVID L.					14,216.41	0.0559%
BJORN, CHAD J. & JENNIFER A.					82,760.00	0.3255%
BJORN, DOT					155,447.76	0.6114%
BJORN, KRISTEN & RICK					110,460.00	0.4345%
BOSS, JAN					19,000.00	0.0747%
BRAEGGER, STEVEN & SUSIE					36,099.94	0.1420%
BRAEGGER, TRAPPER J.					6,200.00	0.0244%
BRIGHT, BONNIE					130,120.59	0.5118%
BROADUS, LONNEY R.					25,000.00	0.0983%
BROWN, DEALTON					10,000.00	0.0393%
BRUNO, JEFF					31,650.00	0.1245%
BRYNER, BOYD					96,773.38	0.3806%
BUCHANAN FAMILY TRUST C/O JOHN SWINDLE & SHANE R. SWINDLE					176,045.64	0.6924%
BULLOCH, BRYAN B.					55,000.00	0.2163%
BURDICK, J. FRANK					43,581.46	0.1714%
BYBEE, DIXIE					74,562.00	0.2933%
CAIN, HOWARD					34,916.00	0.1373%
CAIN, JESSICA					402,162.00	1.5818%
CAIN, TERRY					4,200.00	0.0165%
CALL, MARY E.					17,977.39	0.0707%
CANTRELL, ROD W.					15,399.69	0.0606%
CAPENER, KEN W.					47,750.00	0.1878%
CARTER, JAMES RALPH					69,320.00	0.2726%
CERVANTEZ, COLTON A.					50,000.00	0.1967%
CERVANTEZ, DIANA M.					68,250.00	0.2684%
CERVANTEZ, DUSTIN K.					111,000.00	0.4366%
CHADEZ, STEVEN					53,662.85	0.2111%
CHATTERTON, ALETHA					40,000.00	0.1573%
CHRISTENSEN, MARIANNA & CARLOS					19,931.13	0.0784%
CLARK, FRANCIS J.					44,541.44	0.1752%
CLARK, GWEN					10,000.00	0.0393%
CLARK, MARY ELLEN					95,627.67	0.3761%
CLARK, ROGER A.					7,302.65	0.0287%
CLARK, WARD R.					59,100.00	0.2325%
CLINCH, MARVIN G.					5,000.00	0.0197%
COMBUSTION RESOURCES					375,000.00	1.4749%
CORNIA, LEAH					55,200.00	0.2171%
CORNWALL, JAMES					51,000.00	0.2006%
CORRY, JOHN R.					11,000.00	0.0433%
COTTRELL, DALE					46,310.00	0.1821%
CRIST, ROBERT					280,000.00	1.1013%
CRITCHLOW, PAUL J.					112,000.00	0.4405%
CROZIER, GEORGE & LORNA					93,853.95	0.3691%
CROZIER, KELLY N.					49,100.00	0.1931%
CROZIER, KIT					16,723.34	0.0658%
CRUZ, LEVONA					20,000.00	0.0787%

NAME	ADDRESS	CITY, STATE	ZIP	PHONE	Net Loss on Investment	Percent of Total Net Loss
CRUZ, SYLVESTER					20,000.00	0.0787%
CUNNINGHAM, WILLIS					55,200.00	0.2171%
DALEY, ERNEST & JUDY					28,000.00	0.1101%
DAVIS, FRED					150,000.00	0.5900%
DAVIS, JANICE					30,000.00	0.1180%
DAY, RUSSELL & HEATHER					115,305.00	0.4535%
DILLREE, CAROL & BRENT, KEN					103,216.46	0.4060%
DOCKSTADER, DEE & MINDY					55,000.00	0.2163%
DOUGLAS, LOUIS P., ARTHUR & KAREN					51,600.00	0.2030%
EARL, LEWIS & CAROL					380.00	0.0015%
EARLY, DALMAIN					10,000.00	0.0393%
EATOUGH, CRAIG					200,000.00	0.7866%
EGAN, RUTH					85,227.75	0.3352%
ERICKSON, DAVID C.					109,000.00	0.4287%
ERICKSON, JEANINE					26,700.00	0.1050%
ESTEP, JERRY O.					261,800.00	1.0297%
FAIRBANKS, PATRICE					22,251.58	0.0875%
FIRTH, JEFF					28,371.26	0.1116%
FRANCIS, HOWARD					611,085.00	2.4035%
FRANCIS, LARRY					319,329.00	1.2560%
FRANCIS, LEE C/O LARRY FRANCIS					160,000.00	0.6293%
FRANCIS, VAUGHN & VERNA					100,000.00	0.3933%
FRANCIS, WILLIAM					20,000.00	0.0787%
FRITTS, JOHN					70,000.00	0.2753%
GADDIE, ERMA L.					98,700.00	0.3882%
GARDNER, GARY J. & MERILEE					43,029.00	0.1692%
GARRETT, GAYLEN					29,393.31	0.1156%
GEISLER, LARRY L. & MARSHA H.					10,000.00	0.0393%
GILBERT, BRUCE & TAMRA					174,687.30	0.6871%
GODFREY, GRACE					86,424.79	0.3399%
GOOCH MEMORIAL SCHOLARSHIP					83,500.05	0.3284%
GOODRICH, JESSE					23,008.00	0.0905%
GOODWIN, GREGORY, BANK OF UTAH CUSTODIAL IRA					146,000.00	0.5742%
GRANT, DAN					33,902.00	0.1333%
GRANT, EUGENIA					59,000.00	0.2321%
GREEN, KORRY					20,300.39	0.0798%
GRIFFETH, JOHN D.					5,924.84	0.0233%
GRIFFIN, JUSTIN					4,950.00	0.0195%
GROVER, CLAYTON & TRICIA					79,440.50	0.3125%
HALES, BEVAN & CLO					40,250.00	0.1583%
HAMILTON, RANDY					120,000.00	0.4720%
HANSEN, JAY					70,763.38	0.2783%
HANSEN, KENNETH					85,995.97	0.3382%
HANSEN, LINDA					30,822.16	0.1212%
HANSEN, MERIDENE					68,401.00	0.2690%
HARLEY, FRED & MARILYN					233,363.84	0.9179%
HARLEY, LARON					7,000.00	0.0275%
HARRIS, JULIE					158,312.17	0.6227%
HARROLD, DALE & ANNETTE					15,000.00	0.0590%
HARVEY, SID					45,675.33	0.1796%
HARWARD, RICHARD					100,000.00	0.3933%
HATCH, IRA C.					469,698.68	1.8474%
HAUBART, EDWARD					50,000.00	0.1967%
HAUBERT, JANET					50,000.00	0.1967%
HAWKS, MERLYN					25,000.00	0.0983%
HAWKS, RAYMOND T.					50,000.00	0.1967%
HAYES, LUCY J.					94,473.14	0.3716%
HAYES, RON					5,000.00	0.0197%
HEINDEL, MYRTLE					111,200.00	0.4374%
HENDRY, CAROL					149,500.00	0.5880%
HENNESSY, NANCY & GARY					47,708.35	0.1876%
HENRIE, JIMMY V.					103,273.69	0.4062%
HICKMAN, EDWARD					42,462.96	0.1670%
HILL, KELLEY C. & SHAUNA L.					18,400.00	0.0724%
HILL, LEONARD F.					270,900.00	1.0655%
HILL, MERRIL & MELVA A.					29,000.00	0.1141%
HILL, SHANE & CAMILLE					114,417.75	0.4500%
HIRSCHI, BRANDON & JAMIE R.					15,342.47	0.0603%
HIRSCHI, CLARICE					22,790.00	0.0896%

NAME	ADDRESS	CITY, STATE	ZIP	PHONE	Net Loss on Investment	Percent of Total Net Loss
HIRSCHI, JERRY					21,396.29	0.0842%
HODSON, LYLE M. & RETA C/O ESTER M. ROTHWELL					113,319.33	0.4457%
HOLLINGSWORTH, KIM					15,344.45	0.0604%
HOLMGREN, MELANIE C. & JARED N.					9,540.00	0.0375%
HOLMGREN, PETE & LINDA (CRAIG)					768,136.00	3.0212%
HOWE, CHARLES D. & CHERYL					6,573.81	0.0259%
HOWELL, GRANT B.					100,146.17	0.3939%
HUBER, DOYLE					19,291.50	0.0759%
HUEFNER, CLEO K.					88,965.74	0.3499%
HUNTER, ELLA DEAN					13,541.22	0.0533%
HURD, ROZINE					7,589.97	0.0299%
HURLEY, JOHN THOMAS & SHARON M.					21,600.00	0.0850%
HURREN, WENDELL LIVING TRUST					25,000.00	0.0983%
INGRAM, JOHN E.					75,000.00	0.2950%
JAMES, H. GORDON & INA W.					30,000.00	0.1180%
JEPPESON, BRUCE & CAROL					32,885.95	0.1293%
JEPPESEN, CARLA					6,500.00	0.0256%
JENSEN, CHARLENE					186,993.07	0.7355%
JEPPESEN, LANCE F. & JILLE E MAUSER					180,178.50	0.7087%
JEPPESEN, RON					398,594.58	1.5677%
JOHNSON, BRANDEE I.					10,000.00	0.0393%
JONES, BLAKE					71,708.50	0.2820%
JONES, DAVE & CAROL					13,863.00	0.0545%
JONES, RALPH & SHIRLENE S.					21,700.00	0.0854%
JORDAN, TERRY L.					144,652.83	0.5689%
JOSEPHSON, BOYD O. & JEAN					39,261.60	0.1544%
JULIANO, SHARON					43,746.61	0.1721%
KELLY, FERN c/o Patrick Kelly					70,000.00	0.2753%
KELLY, J. PATRICK					303,400.00	1.1933%
KEONE, MICHAEL					320,000.00	1.2586%
KHONA, JAMES c/o RAMESH KHONA					10,000.00	0.0393%
KHONA, KEVIN					15,000.00	0.0590%
KHONA, KRISHAN					15,000.00	0.0590%
KHONA, KRISTINA					10,000.00	0.0393%
KHONA, RAMESH & MARIAN					25,000.00	0.0983%
KHONA, ROHIT					10,000.00	0.0393%
KING, ANDREW					89,072.91	0.3503%
KING, DARRELL					49,555.00	0.1949%
KING, JOHN					110,579.60	0.4349%
KING, TOSHA					1,000.00	0.0039%
KREY, JOHN					467,123.88	1.8373%
LARSEN, DALE & KATHY					10,000.00	0.0393%
LEAK, DEE & GLENNA					177,238.04	0.6971%
LEAVITT, IREN D.					317,989.74	1.2507%
LEMMON, DONNA					72,438.51	0.2849%
LENZ, KARLA					29,348.08	0.1154%
LISH, LANDEN D. & JULIE A.					10,288.02	0.0405%
LITCHFORD, MICHAEL LEE JR.					26,206.97	0.1031%
LLEWELLYN, ROBERT					100,000.00	0.3933%
LONG, BRYAN					86,008.39	0.3383%
LOVELAND, LANCE					29,716.39	0.1169%
MACFARLANE, FERRIS A. & ARLENE P.					15,000.00	0.0590%
MACFARLANE, TED					47,365.87	0.1863%
MADDOCK, JACKIE					45,538.14	0.1791%
MADSEN, BARBIE					10,492.70	0.0413%
MADSEN, BROOKS & KAREN					6,000.00	0.0236%
MADSEN, BRYAN					6,522.01	0.0257%
MADSEN, JEFF					8,897.06	0.0350%
MANUS, RICHARD L. & TERESA					87,228.63	0.3431%
MANWARING, KIM					150,000.00	0.5900%
MARQUEZ, TERI L.					50,000.00	0.1967%
MARSHELL, CALLEEN					10,000.00	0.0393%
MASON, HAL J. & MARVA L.					9,615.00	0.0378%
MASON, REESE B.					70,971.00	0.2791%
MAUSER, DALE & DEBORAH					4,122.85	0.0162%
MAUSER, MARGARETA					218,479.12	0.8593%
MCCABE, TODD					141,722.23	0.5574%
MCKENZIE, RENNY					23,284.36	0.0916%
MCKINNEY, WILLIAM R. & JENNA L.					43,100.00	0.1695%

NAME	ADDRESS	CITY, STATE	ZIP	PHONE	Net Loss on Investment	Percent of Total Net Loss
MCMURDIE, CLAYTON					16,400.00	0.0645%
MCMURDIE, ZACHARY CHASE					12,130.00	0.0477%
MERRYWEATHER, FRANK B. & JOANN					33,500.00	0.1318%
MERRYWEATHER, RICK					56,691.97	0.2230%
MERRYWEATHER, SUSAN					10,350.00	0.0407%
MILLARD, STAN					11,765.28	0.0463%
MILLER, POLLY					20,233.59	0.0796%
MILLER, WOODRUFF					30,000.00	0.1180%
MILLS, JOSEPH					13,931.88	0.0548%
MILLS, LYNNDA					13,760.43	0.0541%
MOORE, SALLY					49,100.00	0.1931%
MORRELL, M. LEE					174,670.20	0.6870%
MUNSON, MIKE					99,242.99	0.3903%
MYLORIE, HOPE					21,000.00	0.0826%
NEAL, CLAIR D.					45,611.75	0.1794%
NEAL, ERIN E.					25,000.00	0.0983%
NEAL, ROY W.					20,164.51	0.0793%
NELSON, BROOKS & KAREN L.					4,518.10	0.0178%
NELSON, GARY & JAKE					15,178.06	0.0597%
NESSEN, JAMES					9,200.00	0.0362%
NESSEN, LINDA E.					39,750.00	0.1563%
NEUDECKER, DON					94,947.06	0.3734%
NIEHAUS, MARK					90,000.00	0.3540%
NIELSON, TERRY					54,850.00	0.2157%
NORR, MICHAEL					75,175.00	0.2957%
NORTON, SHAWN					208,971.35	0.8219%
OGDEN, KEVIN & ELOISE					128,500.00	0.5054%
OGDEN, MARLENE					24,000.00	0.0944%
ORR, FAYE					25,040.00	0.0985%
OWEN, ROGER					210,711.00	0.8288%
OWEN, WAYNE					168,000.00	0.6608%
OYLER, DEREK					10,044.92	0.0395%
PACKER, BARBARA					30,000.00	0.1180%
PADGETT-BARKER, TRACY					69,839.00	0.2747%
PARKINSON, STEVEN					42,194.55	0.1660%
PAYNE, LEON					63,566.59	0.2500%
PEACOCK, DIXON					220,000.00	0.8653%
PERMANN, LANNY					7,010.52	0.0276%
PETERSON, WILLIS CHASE AND/OR WANDA HYDE					40,000.00	0.1573%
PETERSON, REBECCA A.					42,633.00	0.1677%
PETTY, CHRIS D.					13,500.00	0.0531%
PHILLIPS, ROSS c/o J. OLDHAM					49,000.00	0.1927%
POND, JIM & LUDENE					23,604.63	0.0928%
QUINNEY, VALENE					9,839.03	0.0387%
RAMSEY, AUDREY V.					23,000.00	0.0905%
RANSOM, ROWENE					59,250.00	0.2330%
RICH, CARTER					9,299.98	0.0366%
RICHARDSON, ROBERT A.					24,768.33	0.0974%
ROBINETTE, DENISE F.					16,125.00	0.0634%
ROCHE, MILTON ROCHE FARMS					297,234.37	1.1691%
ROWLEY, JANICE, ROGER					46,522.62	0.1830%
RUBERT, MOLLY					10,000.00	0.0393%
RUPP, BLAINE					20,000.00	0.0787%
RUPP, DEELOY					20,000.00	0.0787%
RUSHTON, DENNIS					10,080.00	0.0396%
SALZETTI, PAUL					25,000.00	0.0983%
SANDERS, RONALD					33,700.00	0.1325%
SARGENT, TROY L.					74,662.65	0.2937%
SEAMONS, GLORIA					110,000.00	0.4327%
SEARLE, CLINTON					231,625.64	0.9110%
SHAFFER, LYNN					123,028.58	0.4839%
SHELLEY SECOND FAMILY PARTNERSHIP					150,000.00	0.5900%
Shelley, Merlin R.					192,500.00	0.7571%
SHELLEY, ROBERT					89,929.81	0.3537%
SHELLEY, ROBERT NGU ENTERPRISES					336,500.00	1.3235%
SHELLEY, ROBERT, NGU PENSION FUND					17,000.00	0.0669%
SHINER, BRENT					20,000.00	0.0787%
SMITH, EVELYN					50,000.00	0.1967%
SMOOT, L. DOUGLAS					300,000.00	1.1800%

NAME	ADDRESS	CITY, STATE	ZIP	PHONE	Net Loss on Investment	Percent of Total Net Loss
SNOW, LYNN					50,456.60	0.1985%
SORENSEN, EARL					15,000.00	0.0590%
STEFFENHAGEN, SCOTT					60,050.00	0.2362%
STEVENS, FRANK					500.00	0.0020%
STEWARD, JENNIFER					30,707.00	0.1208%
STOKES, VAL					54,719.00	0.2152%
SWANK, NORMA L.					208,662.63	0.8207%
SWENSON, DAVID C.					50,000.00	0.1967%
SWINBURNE, ROBERT D.					45,706.64	0.1798%
TAYLOR, CHARLES					190,789.39	0.7504%
TAYLOR, DEE					65,000.00	0.2557%
TEMPLES, WYLMA					100,000.00	0.3933%
TERLOUW, CORNELIS (KEES)					25,000.00	0.0983%
THAYN, LORALIE					25,000.00	0.0983%
THOMAS, THANE					10,000.00	0.0393%
THOMPSON, FAYE W.					23,500.01	0.0924%
THOMPSON, JERAMIE D.					9,691.67	0.0381%
THOMPSON, LLOYD					25,000.00	0.0983%
THOMPSON, TIM D.					48,812.66	0.1920%
THORNLEY, ARLETA					8,000.00	0.0315%
THURGOOD, GARY					10,000.00	0.0393%
THURGOOD, GLEN					130,000.00	0.5113%
TOLMAN, BRYCE D.					285,736.61	1.1239%
TOLMAN, MARK					86,955.00	0.3420%
TREECE, EDWARD K.					73,995.80	0.2910%
TREU, K. MILTON					525,000.00	2.0649%
TULLIS, CARROLL, LILLIAN					74,000.00	0.2911%
UDY, BRYCE H.					46,282.00	0.1820%
VAN VALKENBURG, DEAN					18,300.00	0.0720%
VEATER, HOWARD					42,950.00	0.1689%
WEBB, ARNITA					16,681.95	0.0656%
WEBSTER, DENNIS S.					13,171.10	0.0518%
WELLING, KIM					10,000.00	0.0393%
WILDASIN, JOHN & RUTH					667,504.02	2.6254%
WINGER, LARRY					75,728.91	0.2979%
WINTER, TEX					78,072.00	0.3071%
WITHAM, ROBERT					23,026.68	0.0906%
WOLLMERING, MARY					300,000.00	1.1800%
WOMACK, DALE					95,040.16	0.3738%
WOODWARD, JARED J.					10,000.00	0.0393%
WOODYATT, GLEN					209,906.46	0.8256%
WURSTEN, LEON M.					57,305.22	0.2254%
YODER, ROSALIE E.					15,962.00	0.0628%
YOUD, LES T. LESLIE AND DENICE YOUD					20,000.00	0.0787%
YOUD, THOMAS					5,000.00	0.0197%
YOUNG, JERRY					55,135.00	0.2169%
ZARATE, GENARO					64,628.06	0.2542%
ZUNDEL, RANDY W.					262,225.00	1.0314%
TOTAL UNCHANGED CLAIMS					$ 24,820,259.74	
TOTAL OF ALL CLAIMS					**$ 25,424,652.73**	**100.0000%**

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

KERI MYRICK, Plaintiff, vs. PROVO SCHOOL DISTRICT, Defendant.	ORDER OF REFERENCE Civil No. 2:04-CV-886 DB

IT IS ORDERED that, as authorized by 28 U.S.C. § 636(b)(1)(A) and the rules of this Court, the above entitled case is referred to Magistrate Judge Warner. The magistrate judge is directed to hear and determine any nondispositive pretrial matters pending before the Court.

DATED this 14th day of August, 2006.

BY THE COURT:

Dee Benson

DEE BENSON
United States District Judge

ROBERT BREEZE #4278
Attorney for Defendant
402 East 900 South
Salt Lake City, Utah 84111
Telephone: (801) 322-2138
Facsimile: (801) 328-2554
E-mail: rbreeze@lgcy.com.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH,

CENTRAL DIVISION

UNITED STATES, Plaintiff, v. RICHARD RUNYAN, Defendant.	)	CASE No. 2:05 CR 109 TC ORDER TO CONTINUE SENTENCING HEARING Honorable Tena Campbell

BASED UPON the motion of defendant and good cause appearing therefore it is hereby ordered that sentencing hearing in this matter be continued until the 31 day of August, 2005 at 1:00 P.M.

Dated this 9 day of August, 2006.

Tena Campbell
Honorable Tena Campbell

USDC UT Approved 06/06/00 Revised 01/20/04

United States District Court
District of Utah

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Revocation of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

vs.

Miguel Martinez

Case Number: DUTX **2:05CR000596-001**

Plaintiff Attorney: **Kevin Sundwall**

Defendant Attorney: **Kristen Angelos**

Atty: CJA ___ Ret ___ FPD X

Defendant's Soc. Sec. No.: XXX-XX-9644

Defendant's Date of Birth: 1978

08/02/2006
Date of Imposition of Sentence

Defendant's USM No.: 69144-065

Defendant's Residence Address:

Country

Defendant's Mailing Address:

Country

THE DEFENDANT:
COP _____ **Verdict** _____

[X] admitted to allegation(s) **#1 of the Petition**

[ ] pleaded nolo contendere to allegation(s) _____ which was accepted by the court.

[ ] was found guilty as to allegation(s) _____

Violation Number	**Nature of Violation**	**Date Violation Occured**
1.	The defendant has absconded supervision , as of July 11, 2006, his whereabouts are unknown.	7/11/2006

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

SENTENCE

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of **3 Months**.

Upon release from confinement, the defendant shall be placed on supervised release for a term of **24 Months**.

[ ] The defendant is placed on Probation for a period of _____.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. If the defendant is removed from the United States by ICE officials, he shall not illegally reenter the United States.

2. Pursuant to 42 USC 14135a and 10 USC 1565, as authorized in Section 3 of the DNA Analysis Backlog Elimination Act of 2000 and Section 203 of the Justice for All Act of 2004, the defendant shall submit to the collection of a DNA sample at the direction of BOP or the USPO.

CRIMINAL MONETARY PENALTIES

FINE

The defendant shall pay a fine in the amount of $ **NONE** , payable as follows:

☐ forthwith.

☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.

☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.

☐ other:

☐ The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).

☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), **it is ordered that:**

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

The defendant shall make restitution to the following payees in the amounts listed below:

Name and Address of Payee	Amount of Loss	Amount of Restitution Ordered

Totals: $_____ $_____

(*See* attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☐ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other:

_____

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until _____ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of $ **100.00** , payable as follows:

☐ forthwith.

☒ **The Court reinstates the SAF originally imposed on 5/15/2006.**

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

RECOMMENDATION

☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:

CUSTODY/SURRENDER

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district at _____ on _____ .

☐ The defendant shall report to the institution designated by the Bureau of Prisons by _____ Institution's local time, on _____.

DATE: 8 14 2006

Tena Campbell

Tena Campbell
United States District Judge

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA **Plaintiff,** **ROGER ARLO LIVINGSTON** **Defendant**	**ORDER FOR PSYCHOSEXUAL EXAMINATION & TESTING** **2:05-CR-00642-001-JTG**

It appears that psychosexual examination and testing of the defendant is necessary in order that a more complete presentence report may be prepared pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.

IT IS THEREFORE ORDERED that the defendant submit to an examination conducted by a qualified practitioner as directed by the Probation Office to provide information to the Court pursuant to 5 U.S.C. § 3109.

IT IS FURTHER ORDERED that investigative information may be released to the provider for purposes of testing and evaluation.

IT IS FURTHER ORDERED that the United States Probation Office shall pay all reasonable and necessary expenses from funds allocated for such purposes.

DATED this 14th day of August, _____.

BY THE COURT:

J. Thomas Greene
Senior United States District Judge

STEVEN B. KILLPACK, Federal Defender (#1808)
L. CLARK DONALDSON, Assistant Federal Defender (#4822)
UTAH FEDERAL DEFENDER OFFICE
Attorney for Defendant
46 West Broadway, Suite 110
Salt Lake City, Utah 84101
Telephone: (801) 524-4010
Facsimile: (801) 524-4060

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SHAWN DELANE CLAY, Defendant.	**ORDER AUTHORIZING DEFENDANT TO DIRECTLY TO SURRENDER TO FACILITY OF DESIGNATION** Case No. 2:05-CR-753 DB

Based upon motion of Mr. Clay, concurrence of U.S. Pretrial and stipulation of the government, and good cause appearing therefore;

IT IS HEREBY ORDERED that Mr. Clay is authorized to continue to reside at the home of his father, Virgil Clay, in Byclone, West Virginia until he surrenders himself to the facility of designation, FCI Ashland, Kentucky, on Friday, August 18, 2006 at noon.

IT IS FURTHER ORDERED that Mr. Clay shall abide by all other conditions of pretrial release previously imposed and comply with any additional conditions of release related to this

travel that his pretrial officer deems appropriate.

DATED this 14th day of August, 2006.

Dee Benson

HONORABLE DEE BENSON
United States District Court Chief Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. ALDEN HARMEN CHEE, Defendant.	MEMORANDUM OPINION AND ORDER Case No. 2:05 CR 773

During an interview with investigators at a police station, Defendant Alden Chee made incriminating statements that were later memorialized in a letter of apology written by Mr. Chee in the presence of the investigators. Mr. Chee now argues that his rights, as articulated in Miranda v. Arizona, 384 U.S. 436 (1966), were violated during the police station interview. Additionally, Mr. Chee argues that any incriminating statements that he made during that interview, as well as his confession, were involuntary. On those grounds, Mr. Chee moves to suppress all incriminating statements made during that interview, as well as the letter of apology.

The court concludes that Mr. Chee was not in custody during the interrogation, and therefore the investigators were not obligated to read him his Miranda rights. Additionally, while the investigators utilized subterfuge in their efforts to obtain a confession, that subterfuge did not amount to undue police coercion and did not render Mr. Chee's statements, or his confession, involuntary.

Facts

Early into his investigation of an allegation of rape in the Navajo Nation, Special Agent Matt Larson began to suspect Mr. Chee of the crime. (Transcript of April 13, 2006 Evidentiary Hearing [hereinafter "Tr."] 6.) Desiring to speak with Mr. Chee, Agent Larson made several attempts to contact him at his residence in Monument Valley, Utah. (Id.) After learning that Mr. Chee had a daughter who lived in Blanding, Utah, Agent Larson went to her apartment and left his business card along with a note asking Mr. Chee to call him. (Id.) Mr. Chee eventually contacted Mr. Larson and agreed to meet him at the Blanding City Police station the following day. (Id. at 7.)

Agent Larson did not mention the rape investigation when attempting to contact Mr. Chee. (Id. at 20-21.) Rather, Agent Larson indicated that he wanted to speak to Mr. Chee about an unrelated incident involving a firearm that Mr. Chee had discovered in a vehicle sold at a government auction. (Id. at 19-21.) Mr. Chee had reported his find to the Blanding City Police months earlier, and Agent Larson endeavored to assure Mr. Chee that their discussion would concern that firearm. (Id. at 21.)

The day of the interview, Mr. Chee and his wife walked to the Blanding City Police station. (Id. at 8.) He was greeted in the lobby by Agent Larson, who was accompanied by Henry Lee, a criminal investigator for the Navajo Nation Department of Public Safety. (Id.) Both Agent Larson and Criminal Investigator Lee were in plain clothes with no visible firearms or handcuffs. (Id. at 10.)

After introductions were made, Agent Larson informed Mr. Lee that there was a private location where they could talk. (Id. at 9.) Agent Larson, Criminal Investigator Lee, and Mr. Chee then entered the office of Mike Halliday, the chief of the Blanding City Police Department

and closed the door. (Id. at 9, 29.) Criminal Investigator Lee sat behind Chief Halliday's desk and Agent Larson sat in front of the desk in a chair partially facing that occupied by Mr. Chee. (Id.) The three men were the only people in the office. (Id.)

Before Agent Larson engaged Mr. Chee in conversation, he first informed Mr. Chee that he was not under arrest, did not have to talk with the investigators, and was free to leave at anytime. (Id. at 12.) Although Mr. Chee was the sole suspect in the ongoing rape investigation and was, unbeknownst to him, at the police station to discuss that crime, Agent Larson informed Mr. Chee that he was "not in any trouble." (Id. at 6, 12.)

Agent Larson began the interview by talking with Mr. Chee about the firearm he had discovered in the government-auctioned vehicle. (Id. at 11.) After discussing that topic for five to ten minutes, Agent Larson changed the subject to the rape investigation. (Id. at 13.) He told Mr. Chee that the grandmother of the victim was very upset about the situation. (Id.) Mr. Chee responded that he was aware that the victim's grandmother was upset and that he had spoken with her about the situation. (Id.) Mr. Chee stated that the victim's grandmother was upset because he had entered the victim's bedroom and awakened her. (Id. at 24.) Agent Larson then pressed Mr. Chee to tell him exactly what happened that night. (Id. at 14.) Initially, Mr. Chee denied that he had sex with the victim. (Id.) But when Agent Larson told Mr. Chee, falsely, that the investigators had obtained DNA evidence from the scene, Mr. Chee admitted that he had forcible sex with the victim. (Id. at 14-15.)

Following that admission, Agent Larson asked Mr. Chee if he would be willing to write an apology letter to the victim's grandmother. (Id. at 15.) Mr. Chee agreed to write the letter. (Id.) Agent Larson told Mr. Chee that the letter should accurately describe what happened

between himself and the victim. (Id.) Mr. Chee then wrote the letter, in which he admitted to having sex with the victim against her will. (Id.; Gov. Ex. 1.)

Shortly after the letter of apology was complete, Agent Larson concluded the interview. (Id. at 15-16.) The entire encounter lasted about one hour. (Id. at 16.) Back in the lobby of the police station, Agent Larson asked Mr. Chee if he would submit to a DNA swab. (Id. at 18.) Mr. Chee complied and then left the station with his wife. (Id.)

Analysis

Mr. Chee argues that all incriminating statements obtained by investigators at the Blanding City Police station must be suppressed because (1) the investigators failed to inform Mr. Chee of his Miranda rights before questioning him, and (2) his confession was involuntary. The court concludes that Mr. Chee was not in custody during the interview and therefore the investigators were not required to inform Mr. Chee of his Miranda rights. Additionally, the court concludes that Mr. Chee's confession was voluntary.

I. Mr. Chee's Miranda Rights Were not Violated Because He Was Not in Custody During the Interview

As stated by the Tenth Circuit, "Miranda requires that procedural safeguards be administered to a criminal suspect prior to 'custodial interrogation.'" United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993) (quoting Miranda, 384 U.S. at 444). Before Miranda is implicated in any given situation, two requirements must be met: (1) the individual being questioned must be "in custody"; and (2) the questioning must amount to "interrogation," as those terms have been defined in relevant case law. Id.

It is undisputed that Mr. Chee was not read his Miranda rights at any point during his interview at the Blanding City Police station. The United States also concedes that the

questioning of Mr. Chee by Agent Larson amounted to "interrogation." Therefore, the only question left to be answered is whether Mr. Chee was "in custody" when questioned by Agent Larson.

The United States Supreme Court has held that one is in custody for Miranda purposes if that individual is "deprived of . . . freedom of action in any significant way." 384 U.S. at 444. "The Court has also stated that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Perdue, 8 F.3d at 1463 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curium). To determine if a person was in custody for Miranda purposes, courts assess whether "a reasonable [person] in the suspect's position would have understood his situation . . . as the functional equivalent of formal arrest." Berkemer v. McCarty, 486 U.S. 420, 442 (1984). The record evidence indicates that a reasonable person in Mr. Chee's situation would not have considered his or her freedom curtailed to a degree associated with formal arrest.

The facts of this case are strikingly similar to those in Oregon v. Mathiason, 429 U.S. 492 (1977) (per curium). In Mathiason, an officer investigating a burglary made multiple attempts to contact a suspect. Id. at 493. The officer eventually left his card at the suspect's apartment with a note asking the suspect to contact him "to discuss something." Id. The suspect contacted the officer the next day and agreed to meet him that afternoon at the state patrol office. Id. The officer greeted the suspect when he arrived and led him into an office, closing the door after entering. Id. The officer told the suspect that he was not under arrest and was free to leave at anytime. Id. The meeting resulted in a confession from the suspect. Id. The suspect later sought to suppress his confession, alleging that it was obtained in violation of his Miranda rights.

The Supreme Court held that the suspect's Miranda rights were not implicated during the interrogation because the suspect was not in custody. Id. at 495. The Court noted that the suspect "came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview respondent did in fact leave the police station without hindrance." Id. Based on those facts, the Court concluded that the suspect "was not in custody or otherwise deprived of his freedom of action in any significant way." Id.; see also Beheler, 463 U.S. at 1125 (holding that a suspect was not in custody for Miranda purposes when the suspect voluntarily accompanied police to the station house and was told that he was not under arrest).

Mr. Chee seeks to distinguish Mathiason and Beheler on the grounds that Agent Larson misled Mr. Chee concerning the purpose of the interview. According to Mr. Chee, he arrived at the Blanding City Police station voluntarily only because he anticipated that the meeting was not connected to the rape investigation. Further, Mr. Chee argues that the officers' deception on that point raised such significant credibility concerns that Mr. Chee reasonably believed that Agent Larson was not telling the truth when he stated that Mr. Chee was not under arrest and was free to leave at anytime.

Mr. Chee's attempt to portray the situation as one in which a suspect is unwittingly lured to a police station only to watch investigators spring a custodial trap is not supported by the record. Although it is undisputed that Agent Larson focused his attention on the rape investigation soon after he began to question Mr. Chee, the record indicates that the tone of the interview remained calm and conversational throughout. While Mr. Chee was undoubtedly surprised by the turn the interview took, that unexpected turn alone was insufficient to alter a non-custodial setting into one fairly characterized as custodial.

Mr. Chee arrived at the Blanding City Police station under his own power to attend an interview he helped schedule. Although the questioning quickly veered into unexpected territory, Mr. Chee had been told only minutes before that he was not under arrest and was free to leave at anytime. In fact, at the conclusion of the interview, Mr. Chee shook hands with the investigators and left the station on foot with his wife. "[T]he requirement of warnings [is not] imposed simply because the questioning takes place at the station house, or because the questioned person is one whom the police suspect." Mathiason, 429 U.S. at 495. Mr. Chee's freedom was not sufficiently restrained to render him "in custody" for the purposes of Miranda. Therefore, his claim that his incriminating statements were obtained in violation of Miranda must be rejected.

II. The Absence of Coercive Police Activity Renders Mr. Chee's Incriminating Statements Voluntary

Mr. Chee argues that, even if his Miranda rights were not violated, his statements should nevertheless be suppressed because they were the product of police coercion and therefore were involuntary. "To be admissible, a statement or confession made by a defendant to law enforcement officers must be voluntary." United States v. Aranda-Flores, 313 F. Supp. 2d 1188, 1200 (D. Utah 2004).

When assessing whether statements were voluntary, "the test is whether, considering the totality of the circumstances, the government obtained the statements by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." United States v. Erving L., 147 F.3d 1240, 1248-49 (10th Cir. 1998). The Tenth Circuit has identified the following factors as worthy of consideration when making a voluntariness assessment: "(1) the age, intelligence, and education of the defendant; (2) the length of any

detention; (3) the length and nature of the questioning; (4) whether defendant was advised of [his or] her constitutional rights; and (5) whether the defendant was subjected to physical punishment." Id. at 1249. The Supreme Court has held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167 (1986).

In this case, Mr. Chee is an adult and there is no evidence indicating that he suffers any mental disability or lacks education. The interview at the Blanding City Police station lasted approximately an hour and the questioning centered on an ongoing rape investigation in which Mr. Chee was the sole suspect. While the investigators did not advise Mr. Chee of his rights, he was told that he was not under arrest and was free to leave at any time. Mr. Chee was not subjected to physical punishment of any kind.

Mr. Chee claims that his statements were involuntary because they were the product of repeated police deception. It is beyond dispute that Agent Larson deceived Mr. Chee into arriving at the police station in the first place, told Mr. Chee that he was not in trouble, and also falsely indicated that officers had recovered DNA evidence from the scene. But courts have consistently upheld the use of deceptive interrogation tactics so long as those tactics are not unduly coercive. See, e.g., Frazier v. Cupp, 394 U.S. 731, 739 (1969) (false statement about comments made by a coconspirator did not render confession involuntary); Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998) (false statement that officers recovered suspect's fingerprints in victim's house did not render confession involuntary); cf. Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992) ("[A] lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary."). But see United States v. Lopez, 437 F.3d 1059, 1064-65

(10th Cir. 2006) (interrogator's indication that suspect would receive fifty-four fewer years of imprisonment if he confessed was sufficient to overbear the will of the suspect).

Acknowledging that the weight of authority allows law enforcement significant leeway during interrogations, Mr. Chee concedes that "if the officers had merely lied . . . about the supposed presence of DNA evidence, . . . the legal standards applicable would require a finding that his confession was voluntary." (Reply Memo. in Re Mot. to Suppress 6.) But Mr. Chee argues that the deceptions, considered in total, amounted to impermissible coercion.

The deceptions at issue in this case are not the type that would cause a person's will to be overborne. The first two deceptions identified by Mr. Chee occurred before questioning even began and were not of the type that would render a confession unreliable. See United States v. Crawford, 372 F.3d 1048, 1060-61 (9th Cir. 2004) (confession voluntary even though investigators induced suspect to come to FBI office using trickery). Further, "[i]t is well-settled that a confession is not considered coerced merely because the police misrepresented to a suspect the strength of the evidence against him." Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997). Finally, Mr. Chee was not deceptively offered any promise of leniency in exchange for his confession or cooperation and was not threatened with any penalty if he did not confess. Even considering the totality of the circumstances, the investigators did not unduly coerce Mr. Chee into making incriminating statements.

Conclusion

Mr. Chee was not in custody when questioned by Agent Larson. Further, although investigators did deceive Mr. Chee about the reason for the interview, stated that he was not in trouble, and lied about the state of the evidence against him, those actions were not so coercive

that Mr. Chee's statements must be suppressed as involuntary. Therefore, Mr. Chee's Motion to Suppress is DENIED.

DATED this 15th day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

RONALD D. RUSSO, Plaintiff, vs. BALLARD MEDICAL PRODUCTS, and KIMBERLY-CLARK CORPORATION, Defendants.	ORDER REGARDING AUGUST 14, 2006 HEARING Case No. 2:05 CV 59

In an order dated August 10, 2006, the court took under advisement certain motions relating to the testimony of three proposed expert witnesses. The court held a hearing on August 14, 2006, at which those witnesses appeared and were examined by counsel for the parties. For the reasons set forth at that hearing, the court orders as follows:

Plaintiff's Motion to Preclude Expert Testimony from Patent Attorney Bern S. Broadbent (dkt. #171) is GRANTED.

Defendants' Motion to Strike the "Expert" Report of Plaintiff Ronald D. Russo & Preclude Him from Testifying as an Expert (dkt. #189) is DENIED.

Defendants' Motion to Strike the Expert Report of E. Robert Purdy and to Exclude his Testimony (dkt. #199) is GRANTED in part and DENIED in part. Mr. Purdy will be allowed to offer testimony relating to sections VI and VII of his expert report.

The final pretrial conference is set for Thursday, October 26, 2006, at 2:30 p.m. Before that conference, counsel are instructed to prepare and submit proposed voir dire and jury

instructions. Additionally, counsel shall submit a suggested introductory statement that describes the nature of this case, and which the court may read to the jury before trial begins.

SO ORDERED this 14th day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PROSPER, INC., a Utah corporation, successor in interest to ETHAN AND RANDY, LC, a Utah limited liability company, Plaintiff, v. INNOVATIVE SOFTWARE TECHNOLOGIES, INC., a California corporation, Defendant.	)	***AMENDED SCHEDULING ORDER*** Case No. 2:05cv00098 PGC Honorable Paul G. Cassell

This matter came before the Court for rescheduling after the Tenth Circuit of the U.S. Court of Appeals affirmed the Court's decision to deny plaintiff's request for injunctive relief. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

1. **INITIAL DISCLOSURES**: The parties have completed their Rule 26(a)(1) initial disclosures.

2. **DISCOVERY LIMITATIONS**

		NUMBER
a.	Maximum Number of Depositions by Plaintiff (Unless depositions are required of third party clients, customers and employees. In that case, additional depositions will be required.)	10

b.	Maximum Number of Depositions by Defendant (Unless depositions are required of third party clients, customers and employees. In that case, additional depositions will be required.)	10
c.	Maximum Number of Hours for Each Deposition	7
d.	Maximum Number of Interrogatories by any Party to any Party	25

3. AMENDMENT OF PLEADINGS/ADDING PARTIES

		DATE
a.	Last day to file Motion to Amend Pleadings	08/03/06
b.	Last day to file Motion to Add Parties	08/03/06

4. RULE 26(a)(2) REPORTS FROM EXPERTS

		DATE
a.	Plaintiff	1/15/07
b.	Defendant	2/15/07

5. OTHER DEADLINES

		DATE
a.	Discovery to be completed by:	
	Fact Discovery	3/30/07
	Expert Discovery	3/30/07
b.	Final date for supplementation of disclosures and discovery under Rule 26(e)	every 60 days; 30 days before trial
c.	Deadline for filing dispositive or potentially dispositive motions	4/30/07

6. SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION

		DATE
a.	Referral to Court-Annexed Mediation; Discovery to be completed by:	Cannot be evaluated prior to completion of discovery
b.	Referral to Court-Annexed Arbitration	Unlikely
c.	Evaluate case for Settlement/ADR on	11/01/06
d.	Settlement probability cannot be evaluated prior to	11/01/06

7. TRIAL AND PREPARATION FOR TRIAL

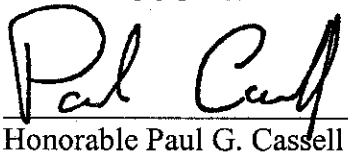
				DATE
a.	Rule 26(a)(3) Pretrial Disclosures:			
	Plaintiff			7/10/2007
	Defendants			7/10/2007
b.	Objections to Rule 26(a)(3) Disclosures			10 days after service of final disclosures
c.	Special Attorney Conference on or before			_____
d.	Settlement Conference on or before			7/31/2007
e.	Final Pretrial Conference			8/20/2007 at 3:00 PM
f.	Trial	**Length**	**Time**	**Date**
	i. Bench Trial			
	ii. Jury Trial	4 days	8:00 AM - 1:00 PM	9/10-9/13/2007

8. OTHER MATTERS

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine, should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

DATED this 14th day of August, 2006.

BY THE COURT:



Honorable Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

TOUCH-TEL, USA, L.P., Plaintiff, vs. NETWORK MANAGEMENT, INC., DELTACOM NETWORKS, INC., SANTOS COMMUNICATIONS LLC, MR. VIJAYA SANTOS, PEPLO COMMUNICATIONS LLC, and MR. FLYNN NEELAMKAVIL, Defendants.	**PERMANENT INJUNCTION ORDER AGAINST PEPLO COMMUNICATIONS, LLC AND MR. FLYNN NEELAMKAVIL** Case No. 2:05-cv-00188 TC Judge Tena Campbell

* * * * *

PERMANENT INJUNCTION ORDER

Having considered the *Stipulation and Motion For Entry of Permanent Injunction Order against Peplo Communications, LLC and Mr. Flynn Neelamkavil*, and all other pleadings and papers on file, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Peplo Communications, LLC and Mr. Flynn Neelamkavil, jointly and severally, and their respective affiliates, officers, directors, employees, heirs, successors, and assigns (collectively "Peplo"), hereby are permanently restrained and enjoined after entry of this Order from any further activity in violation of Touch-Tel USA, L.P.'s ("Touch-Tel") trademarks and trade dress. Specifically,

Peplo is permanently restrained and enjoined from: (a) using itself or through another, or assisting or encouraging another to use, in any manner or form, the term "LA CASA BLANCA," or any other term confusingly similar to Touch-Tel's LA CASA BLANCA mark; (b) using the trade dress displayed on Touch-Tel's LA CASA BLANCA card, or any trade dress confusingly similar to the trade dress displayed on Touch-Tel's LA CASA BLANCA; and (c) advertising, promoting, manufacturing, printing, offering to sell, selling, and/or providing a calling card, a phone connection, telecommunications services, and/or minutes for a calling card, and/or any other telecommunications product or service that contains and/or uses the term "CASA BLANCA," the trade dress displayed on Touch-Tel's LA CASA BLANCA, and/or any mark or trade dress confusingly similar to the foregoing.

BE IT FURTHER ORDERED that, within five (5) business days of the execution of this Order, Peplo shall destroy or caused to be destroyed all calling cards in their possession, custody or control that contain the term "CASA BLANCA" or the trade dress on Touch-Tel's LA CASA BLANCA card and shall certify in writing to Touch-Tel, through Touch-Tel's counsel of record, within ten (10) business days of the execution of this Order that the foregoing destruction has been completed.

Touch-Tel and Peplo shall pay all of their own attorneys' fees and costs incurred in this matter and in this dispute.

In the event of Peplo's noncompliance with this Order, Touch-Tel shall give written notice of such noncompliance to Peplo, setting forth specifically Peplo's actions or inactions which Touch-Tel alleges constitutes noncompliance, and shall give Peplo five (5) days to bring

into compliance (or if such compliance shall require more than five (5) days to bring into compliance, shall give Peplo five (5) days to show good faith efforts to bring in compliance) with this Order. After such notice and time to comply, Touch-Tel may bring an action in this Court to enforce this Order. The Court shall retain jurisdiction to enforce the terms of this Order.

DATED this 14 day of August, 2006.

The Honorable Tena Campbell
United States District Judge

Approved as to Form by:

PEPLO COMMUNICATIONS, LLC

By: _____

Title: President

Print Name: Flynn Neelamkavil

FLYNN NEELAMKAVIL, individually

_____

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Attorneys for the Utah Insurance Department

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

OLD STANDARD LIFE INSURANCE COMPANY IN REHABILITATION, GARY SMITH, Directory of the State of Idaho Department of Insurance, in His Capacity as Rehabilitator of Old Standard Life Insurance Company in Rehabilitation, OLD WEST ANNUITY & LIFE INSURANCE COMPANY IN REHABILITATION, and CHRISTINA URIAS, Director of the State of Arizona Department of Insurance in Her Capacity as Receiver of Old West Annuity & Life Insurance Company in Rehabilitation,

Plaintiffs,

v.

DUCKHUNT FAMILY LIMITED PARTNERSHIP, a Nevada limited partnership,

Defendant.

ORDER TO INTERVENE FOR A LIMITED PURPOSE

Case No.: 2:05-cv-00536

Judge: Paul G. Cassell

DUCKHUNT FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership,

Counter-Plaintiff,

v.

OLD STANDARD LIFE INSURANCE COMPANY IN REHABILITATION, GARY SMITH, Directory of the State of Idaho Department of Insurance, in His Capacity as Rehabilitator of Old Standard Life Insurance Company in Rehabilitation, OLD WEST ANNUITY & LIFE INSURANCE COMPANY IN REHABILITATION, and CHRISTINA URIAS, Director of the State of Arizona Department of Insurance in Her Capacity as Receiver of Old West Annuity & Life Insurance Company in Rehabilitation,

Counter-Defendants,

AMERICA WEST TITLE AGENCY, INC., a Utah Corporation, LAWYERS TITLE INSURANCE CORPORATION, a Virginia Corporation, and JOHN DOES 1-5,

Third-Party Defendants.

Based upon the Motion to Intervene for a Limited Purposed filed by the Utah Attorney General's Office on behalf of the Utah Insurance Department on or about July 25, 2006, and pursuant to United States Code, Title 28 § 2403, and the Federal Rules of Civil Procedure, Rules

5 and 24, and for good cause appearing:

The Utah Insurance Department, by and through its attorneys, Perri Ann Babalis, Utah Assistant Attorney General, is granted leave to intervene in this matter for the limited purpose of defending the constitutionality of Utah Code Ann. § 31A-23a-407.

DATED this 14TH day of AUGUST 2006.

BY THE COURT:

PAUL G. CASSELL
U.S. DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2006, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing [Proposed] Order to Intervene for a Limited Purpose, to:

Steven W. Call
Benjamin J. Kotter
RAY QUINNEY & NEBEKER, P.C.
36 South State Street, Suite 1400
PO Box 45385
Salt Lake City, UT 84145

Donald J. Winder
John W. Holt
WINDER & HASLAM, P.C.
175 West 200 South #4000
PO Box 2668
Salt Lake City, UT 84110-2668

Richard A. Rappaport
Leslie Van Frank
Julie A. Bryan
COHNE, RAPPAPORT & SEGAL, P.C.
257 East 200 South, Suite 700
PO Box 11008
Salt Lake City, UT 84147

John P. Harrington
Katherine Norman
HOLLAND & HART, LLP
60 East South Temple #2000
Salt Lake City, UT 84111

/s/ Jennifer Smith

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MARKEL AMERICAN INSURANCE COMPANY, Plaintiff, vs. SHARPE MARINE, INC., SHARPE HOUSEBOATS, ZF MARINE ELECTRONICS, LLC, MATHERS CONTROLS, INC., ARAMARK SPORTS AND ENTERTAINMENT SERVICES, INC. d/b/a "LAKE POWELL RESORTS AND MARINAS"; and DOES 1-30, inclusive, Defendants.	ORDER GRANTING MOTION FOR CONSOLIDATION Case No. 2:05-CV-00616 PGC

Defendant Aramark Sports Entertainment, Inc., pursuant to DU CivR 42-1 and Fed. R. Civ. P. 42, moves to consolidate the above-captioned case with the matter pending in this court named *Aramark Sports and Entertainment Services, Inc. v. Paradise Bay, LLC; D. Ben Hedgpeth; Bruce White; James K. Wilson; Tom Mitchell; Steven Casement; Richard Ackley and Stuart Ackley*, Case No. 2:06-CV-00468 DAK [#43]. Aramark states that both cases involve common questions of law and fact, arise from the same event and substantially involve the same parties and property. No party has filed a memorandum in opposition to this consolidation

motion. For good cause shown, in the interest of judicial efficiency, and as allowed under DU Civ R 42-1, the court orders this case consolidated with Case No. 2:06-CV-00468 DAK.

SO ORDERED.

DATED this 14th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

James L. Barnett, 7262
Amy Poulson, 9378
HOLLAND & HART LLP
60 E. South Temple, Suite 2000
Salt Lake City, Utah 84111-1031
Telephone: (801) 799-5800
Fax: (801) 799-5700

Attorneys for Plaintiff Metropolitan Life Insurance Co.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

METROPOLITAN LIFE INSURANCE, CO., Plaintiff, v. ROSEMARIE CARUSO, and J.C. a minor child, Defendants.	**ORDER EXTENDING TIME** Civil No. 02:05cv00768 Judge Dee Benson

The Court, having considered the Stipulation for Extension of Time to Respond to Writ of Garnishment and Answers to Interrogatories, and being otherwise informed, HEREBY ORDERS THAT

Metropolitan Life Insurance Co.'s time for responding to the Writ of Garnishment and the Answers to Interrogatories is hereby extended until August 25, 2006.

Dated this 15th day of August, 2006.

UNITED STATES DISTRICT COURT

Dee Benson

Judge Dee Benson

CERTIFICATE OF SERVICE

I certify that on August 14, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Earl D. Tanner
Tanner &Tanner
68 South Main Street, 8th Floor
Salt Lake City, Utah 84101-1504

Craig Zollinger
50 W Broadway, Suite 2000
Salt Lake City, Utah 84101-2024

/s/ Mary Loll

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAMIRO ESQUIVEL, Defendant.	:	2:06CR 00231 TC ORDER EXTENDING TIME FOR RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS Honorable Tena Campbell

The Court hereby ORDERS that the time for the United States to respond to Defendant's motion to suppress memorandum be extended until August 21, 2006.

The Court further ORDERS pursuant to 18 U.S.C. § 3161(8)(h)(A) that all time through August 21, 2006, be excluded from computation of time under the Speedy Trial Act.

DATED this 11 of July, 2006.

Aug

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United State District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

United States of America,
Plaintiff

v.

David Carver Weston,
Defendant

ORDER FOR PRO HAC VICE ADMISSION

Case Number 2:06-CR-00303-TC

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Peter B. Loewenberg in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this 13 day of Aug, 2006.

Tena Campbell
U.S. District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THEODORE L. HANSEN; INTERSTATE ENERGY CORP.; AND TRIPLE M, L.L.C., Plaintiffs, vs. NATIVE AMERICAN REFINERY CO. aka NATIVE AMERICAN REFINERY COMPANY, INC.; PT. BANK NEGARA INDONESIA (PERSERO) TBK; EKO BUDIWIYONO; DRS. FIRMANSYAH; GATOT SISMOYO; RACHMAT WIRIATMAJA; YOPIE LAMONGE; MAX NIODE; LILLES HANDAYANI; UTTI KARIAYAM; MUBARIK ASDJATIMUDA; STEVE O.Z. FINKEL-MINKIN aka STEVE FINKEL; ROBERT MCKEE; FRED NEWCOMB; NEWCOMB & CO.; AND DOES 1-20, Defendants.	ORDER APPROVING JOINT MOTION AND STIPULATION FOR ENLARGEMENT OF TIME Case No. 2:06-CV-00109 PGC

This matter comes before the court on the parties' stipulated request to extend the time for the defendants, Native American Refinery Company and Robert McKee, to file a pleading in response to the plaintiffs' First Amended Complaint. The defendants' motion [#31] is APPROVED. Native American Refinery Company and Robert McKee shall file and serve their

responsive pleadings on or before August 18, 2006. When seeking any future extensions, counsel for the defendants is reminded to explain the cause, as required by the rules.[1]

SO ORDERED.

DATED this 14th day of August, 2006.

Paul G. Cassell
United States District Judge

[1]*See* Fed. R. Civ. P. 6(b); D.U. Civ. 7-1(b)(1).

BRETT L. TOLMAN, Acting United States Attorney (#8821)
JARED C. BENNETT, Assistant United States Attorney (#9097)
Attorneys for the United States of America
185 South State Street, Ste. 400
Salt Lake City, Utah 84111
Telephone: (801) 524-5682

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	Civil No. 2:06CV00151 TC
Petitioner,	:	ORDER OF DISMISSAL
v.	:	
INOKE KATOA,	:	
Respondent.	:	

Based upon the United States' Notice of Dismissal and good cause appearing therefor,

IT IS HEREBY ORDERED that this case is DISMISSED, with each party to bear its own costs.

DATED this 14 day of Aug 2006.

BY THE COURT:

Tena Campbell

Honorable Judge Tena Campbell
United States District Court

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

LESLIE D. CURTIS, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of the Social Security Administration Defendant.	**SCHEDULING ORDER** Civil No. 2:06CV0231 PGC Judge Paul G. Cassell

The court establishes the following scheduling order in the above captioned case:

1. Plaintiff's motion for review of the Commissioner's decision and accompanying memorandum should be filed by September 8, 2006.

2. Defendant's memorandum in opposition should be filed by October 6, 2006.

3. Plaintiff may file a reply memorandum by October 20, 2006.

DATED this 14th day of August, 2006.

BY THE COURT:

Honorable Paul G. Cassell

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH CENTRAL DIVISION

DAVID MULLINS and VANESSA MULLINS, Individually and on behalf of BRIDGETT MULLINS, a Minor Child, Plaintiffs, v. McNEIL CONSUMER & SPECIALTY PHARMACEUTICALS, a Division of McNEIL-PPC, INC. and JOHNSON & JOHNSON, Defendants.	SCHEDULING ORDER AND ORDER VACATING INITIAL PRETRIAL HEARING Case No. 2:06cv266 PGC District Judge Paul G. Cassell

Pursuant to Fed.R. Civ P. 16(b), the Magistrate Judge[1] received the Attorneys' Planning Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing *set for August 16, 2006 at 11:00 a.m. is VACATED.*

ALL TIMES 4:30 PM UNLESS INDICATED

1.		PRELIMINARY MATTERS		DATE
	a.	Was Rule 26(f)(1) Conference held?	*Yes*	*07/11/06*
	b.	Has Attorney Planning Meeting Form been submitted?	*Yes*	*07/17/06*
	c.	Was 26(a)(1) initial disclosure completed?		*10/02/06*
2.		DISCOVERY LIMITATIONS		NUMBER
	a.	Maximum Number of Depositions by Plaintiff(s)		*30*[*]
	b.	Maximum Number of Depositions by Defendant(s)		*20*[*]

[*] This total does not include expert witness depositions that the parties expect to take.

	c.	Maximum Number of Hours for Each Deposition (unless extended by agreement of parties)	*7*
	d.	Maximum Interrogatories by any Party to any Party	*100*
	e.	Maximum requests for admissions by any Party to any Party	*No Limit*
	f.	Maximum requests for production by any Party to any Party	*No Limit*
3.		AMENDMENT OF PLEADINGS/ADDING PARTIES[2]	DATE
	a.	Last Day to File Motion to Amend Pleadings	*01/02/07*
	b.	Last Day to File Motion to Add Parties	*02/02/07*
4.		RULE 26(a)(2) REPORTS FROM EXPERTS[3]	DATE
	a.	Plaintiff	*05/17/07*
	b.	Defendant	*06/22/07*
	c.	Counter reports	*07/06/07*
5.		OTHER DEADLINES	DATE
	a.	Discovery to be completed by:	
		Fact discovery:	04/02/07
		Expert discovery	*09/14/07*
	b.	*(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e)	*12/07/07*
	c.	Deadline for filing dispositive or potentially dispositive motions	*10/19/07*
6.		SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION	DATE
	a.	Referral to Court-Annexed Mediation:	*Yes*
	b.	Referral to Court-Annexed Arbitration	*No*
	c.	Evaluate case for Settlement/ADR on	
	d.	Settlement probability:	*Fair*

7.	TRIAL AND PREPARATION FOR TRIAL		TIME	DATE
a.	Rule 26(a)(3) Pretrial Disclosures[4]			
	Plaintiff			*01/11/08*
	Defendant			*01/25/08*
b.	Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)			*As provided in Rule*
c.	Special Attorney Conference[5] on or before			*02/08/08*
d.	Settlement Conference[6] on or before			*02/22/08*
e.	Final Pretrial Conference		*3:00 p.m.*	*03/06/08*
f.	Trial	Length		
	i. Bench Trial			
	ii. Jury Trial	*15 days*	*8:00 a.m.*	*03/24/08*

8. OTHER MATTERS

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this 15th date of August, 2006.

BY THE COURT:

David Nuffer
U.S. Magistrate Judge

[1] The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The

name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).

[2] Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

[3] The identity of experts and the subject of their testimony shall be disclosed as soon as an expert is retained or, in the case of an employee-expert, as soon as directed to prepare a report.

[4] Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

[5] The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

[6] The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CENTRAL UTAH WATER CONSERVANCY DISTRICT, a Water Conservancy District organized under the laws of the State of Utah, Plaintiff, vs. TRUMAN G. MADSEN, an individual, and ANN N. MADSEN, an individual, Defendants.	ORDER AND MEMORANDUM DECISION Case No. 2:06 CV 361

Plaintiff Central Utah Water Conservancy District ("CUWCD") initiated this action in the Eighth District Court of the State of Utah, seeking condemnation of property owned by Truman G. and Ann N. Madsen. CUWCD alleges that condemnation of the Madsens' property is necessary to effectuate an expansion of the Big Sand Wash Dam and Reservoir in Duchesne County, Utah. The Madsens removed the action to this court, arguing that federal agencies are real parties in interest and that CUWCD is pursuing the condemnation as the alter ego of the United States Bureau of Reclamation, all in an effort to circumvent the necessity of congressional approval. Shortly after removal, CUWCD filed a motion seeking a remand to state court due to lack of federal jurisdictions.

The Madsens have not sufficiently shown that this court has subject-matter jurisdiction over the complaint. Accordingly, CUWCD's motion to remand is GRANTED.

Analysis

The United States Code provides that the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The United States Code also allows actions originally filed in state court to be removed to a federal court, "[w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action . . . ." Id. § 1441(c). In such a circumstance, "the entire case may be removed." Id.

However, "since the courts of the United states are courts of limited jurisdiction, there is a presumption against [the existence of federal jurisdiction]." Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974); see also Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) ("Removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.").

In Central Utah Water Conservancy District v. Cummings, 2:06-CV-362 (D. Utah, June 22, 2006), the court requested briefing on the existence of federal jurisdiction in a situation identical to that presented by this case. In reaching its determination that a remand was necessary, the court dismissed arguments identical to those raised by the Madsens here. Specifically, the court concluded that CUWCD's complaint confined itself to a state law claim of condemnation, with no reference to the involvement of federal agencies or federal law. See id. at 4-6. The court noted that "[a] federal right must be an essential element of the plaintiff's claim in the state complaint, as 'the controversy must be disclosed on the face of the complaint, unaided by the answer or by the petition for removal.'" Id. at 3 (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936)).

The CUWCD complaint at issue in this case is similarly confined to a proceeding governed by state law. Although the Madsens are correct that exhibits attached to CUWCD's complaint reference federal law and include a congressional resolution, the court in Cummings concluded that the inclusion of such material was limited to the purpose of providing relevant background to a proceeding that otherwise involves only a state entity invoking state law. 2:06-CV-362 at 6.

The rationale underlying the court's opinion in Cummings is persuasive. Accordingly, the court adopts the analysis undertaken in Cummings and orders that this matter be remanded to the state court. The Motion of Plaintiff Central Utah Water Conservancy District to Remand Action to State Court for Lack of Subject Matter Jurisdiction is GRANTED.

SO ORDERED this 14th day of August, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

ERIKA BIRCH (Bar No. 10044)
ERIK STRINDBERG (Bar No. 4154)
STRINDBERG SCHOLNICK & CHAMNESS, LLC
426 North 300 West
Salt Lake City, Utah 84103
Telephone: 801-359-4169
erikaecf@xmission.com
erikecf@xmission.com
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

JOHN DOYLE Plaintiff, vs. FLYING J INC., et al. Defendants.	**ORDER GRANTING STIPULATION FOR EXTENSIONS OF TIME TO FILE REPLY AND RESPONSE PLEADINGS** Case Number: 2:06cv429 Judge Tena Campbell

Based on the parties' Stipulation For Extensions of Time To File Reply and Response Pleadings, and good cause appearing therefore,

IT IS ORDERED that Plaintiff John Doyle shall have up to and including August 25, 2006, to file a Reply Memorandum supporting his Motion for Partial Judgment on the Pleadings and to respond to Defendants' Motion Pursuant to Rule 56(f).

DATED this 13 day of August 2006.

Judge Tena Campbell
United States District Court Judge

Approved as to Form:

HOLLAND & HART LLP

/S/ Bryan K. Benard
(*Signed by Filing Attorney with permission of Defense Attorney)*
Bryan K. Benard, Esq.
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CAMPBELL, Plaintiff, vs. SOCIAL SECURITY ADMINISTRATION, Defendant.	ORDER OF REFERENCE Civil No. 2:06-CV-00459 PGC

IT IS ORDERED that, as authorized by 28 U.S.C. § 636(b)(1)(B) and the rules of this Court, the above entitled case is referred to Magistrate Judge Brooke Wells. The magistrate judge is directed to manage the case, receive all motions, hear oral arguments, conduct evidentiary hearings as deemed appropriate, and to submit to the undersigned judge a report and recommendation for the proper resolution of dispositive matters presented.

DATED this 15th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JOHN A. CAMPBELL, Plaintiff, vs. MUNICIPALITY OF LAKEWOOD, Defendant.	ORDER TO TERMINATE REFERRAL TO MAGISTRATE JUDGE Case No. 2:06-CV-00477 PGC

On August 11, 2006, this court issued an order to consolidate a series of cases involving the same plaintiff, John A. Campbell. This is one of the cases affected by that order. In order to give effect to the court's prior consolidation order, the court orders that the referral of this case to Magistrate Judge Samuel Alba be terminated.

SO ORDERED.

DATED this 14th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MARKEL AMERICAN INSURANCE COMPANY, Plaintiff, vs. SHARPE MARINE, INC., SHARPE HOUSEBOATS, ZF MARINE ELECTRONICS, LLC, MATHERS CONTROLS, INC., ARAMARK SPORTS AND ENTERTAINMENT SERVICES, INC. d/b/a "LAKE POWELL RESORTS AND MARINAS"; and DOES 1-30, inclusive, Defendants.	ORDER GRANTING MOTION FOR CONSOLIDATION Case No. 2:05-CV-00616 PGC

Defendant Aramark Sports Entertainment, Inc., pursuant to DU CivR 42-1 and Fed. R. Civ. P. 42, moves to consolidate the above-captioned case with the matter pending in this court named *Aramark Sports and Entertainment Services, Inc. v. Paradise Bay, LLC; D. Ben Hedgpeth; Bruce White; James K. Wilson; Tom Mitchell; Steven Casement; Richard Ackley and Stuart Ackley*, Case No. 2:06-CV-00468 DAK [#43]. Aramark states that both cases involve common questions of law and fact, arise from the same event and substantially involve the same parties and property. No party has filed a memorandum in opposition to this consolidation

motion. For good cause shown, in the interest of judicial efficiency, and as allowed under DU Civ R 42-1, the court orders this case consolidated with Case No. 2:06-CV-00468 DAK.

SO ORDERED.

DATED this 14th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

HOWREY LLP
Richard W. Casey (0590)
John H. Bogart (8305)
Evelyn J. Furse (8952)
Nicole A. Skolout (10223)
170 South Main Street, Suite 400
Salt Lake City, UT 84101
Telephone: (801) 533-8383
Facsimile: (801) 531-1486

Attorneys for Defendant SunCrest, L.L.C.;
Westerra Management, L.L.C.; and
Marc Scroggins

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

U.S. GENERAL, INC., a Utah corporation; D.J. INVESTMENT GROUP, LLC, a Utah limited liability company; DAN SIMONS, an individual; and ARDEN BODELL, an individual,

Plaintiffs,

vs.

DRAPER CITY, a municipal corporation; DAE/WESTBROOK; SUNCREST, L.L.C.; WESTERRA MANAGEMENT, L.L.C.; MARC SCROGGINS; and JOHN DOES 1 through 10,

Defendants.

~~[PROPOSED]~~ **ORDER GRANTING EX PARTE MOTION TO WITHDRAW**

Case No. 2:06CV00488 DB

Judge Dee Benson
Magistrate David O. Nuffer

(Oral Argument Requested)

IT IS HEREBY ORDERED that Evelyn J. Furse, Esq. is granted leave to withdraw as counsel for Defendants SunCrest, L.L.C., Westerra Management, L.L.C., and Marc Scroggins

IT IS FURTHER ORDERED that Richard W. Casey, Esq., John H. Bogart, Esq., and Nicole A. Skolout, Esq. shall be substituted as counsel for Defendants SunCrest, L.L.C., Westerra Management, L.L.C., and Marc Scroggins.

DATED this 14th day of August, 2006.

Dee Benson

HON. DEE BENSON,
U.S. District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification to the following:

Jody K. Burnett
George A. Hunt
fedct@wilhunt.com

and I hereby certify that I have sent the document by other means to the following non-CM/ECF participant:

Denver C. Snuffer
NELSON SNUFFER DAHLE & POULSEN
10885 S. State Street
Sandy, UT 84070

/s/ Lynda A. Hansen

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JEROME VICTOR TRAFNY,	)	
	)	
Plaintiff,	)	Case No. 2:06-CV-578 TC
	)	
v.	)	District Judge Tena Campbell
	)	
UNITED STATES OF AMERICA et al.,	)	**O R D E R**
	)	
Defendants.	)	

Plaintiff, Jerome Victor Trafny, filed a *pro se* prisoner civil rights complaint.[1] The Court has already granted Plaintiff's request to proceed without prepaying the entire filing fee.

Even so, Plaintiff must eventually pay the full $350.00 filing fee required.[2] Plaintiff must start by paying "an initial partial filing fee of 20 percent of the greater of . . . the average monthly deposits to [his inmate] account . . . or . . . the average monthly balance in [his inmate] account for the 6-month period immediately preceding the filing of the complaint."[3] Under this formula, Plaintiff must pay $2.41. If this initial partial fee is not paid within thirty days, or if Plaintiff has not shown he has no means to pay the initial partial filing fee, the complaint will be dismissed.

Plaintiff must also complete the attached "Consent to

[1] *See* 42 U.S.C.S. § 1983 (2006).

[2] *See* 28 *id.* § 1915(b)(1).

[3] *Id.*

Collection of Fees" form and submit the original to the inmate funds accounting office and a copy to the Court within thirty days so the Court may collect the balance of the entire filing fee Plaintiff owes. Plaintiff is also notified that pursuant to Plaintiff's consent form submitted to this Court, Plaintiff's correctional facility will make monthly payments from Plaintiff's inmate account of twenty percent of the preceding month's income credited to Plaintiff's account.

IT IS THEREFORE ORDERED that:

(1) Although the Court has already granted Plaintiff's application to proceed *in forma pauperis*, Plaintiff must still eventually pay $350.00, the full amount of the filing fee.

(2) Plaintiff must pay an initial partial filing fee of $2.41 within thirty days of the date of this Order, or his complaint will be dismissed.

(3) Plaintiff must make monthly payments of twenty percent of the preceding month's income credited to Plaintiff's account.

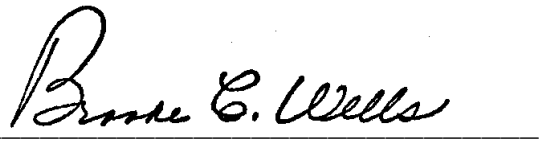
(4) Plaintiff shall make the necessary arrangement to give a copy of this Order to the inmate funds accounting office at Plaintiff's correctional facility.

(5) Plaintiff shall complete the consent to collection of fees and submit it to the inmate funds accounting office at

Plaintiff's correctional facility and also submit a copy of the signed consent to this Court within thirty days from the date of this Order, or the complaint will be dismissed.

DATED this 15th day of August, 2006.

BY THE COURT:



BROOKE C. WELLS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CONSENT TO COLLECTION OF FEES FROM INMATE TRUST ACCOUNT

I, Jerome Victor Trafny (Case No. 2:06-CV-578 TC), understand that even though the Court has granted my application to proceed *in forma pauperis* and filed my complaint, I must still eventually pay the entire filing fee of $350.00. I understand that I must pay the complete filing fee even if my complaint is dismissed.

I, Jerome Victor Trafny, hereby consent for the appropriate institutional officials to withhold from my inmate account and pay to the court an initial payment of $2.41, which is 20% of the greater of:

(a) the average monthly deposits to my account for the six-month period immediately preceding the filing of my complaint or petition; or

(b) the average monthly balance in my account for the six-month period immediately preceding the filing of my complaint or petition.

I further consent for the appropriate institutional officials to collect from my account on a continuing basis each month, an amount equal to 20% of each month's income. Each time the amount in the account reaches $10, the Trust Officer shall forward the interim payment to the Clerk's Office, U.S. District Court for the District of Utah, 350 South Main, #150, Salt Lake City, UT 84101, until such time as the $350.00 filing fee is paid in full.

By executing this document, I also authorize collection on a continuing basis of any additional fees, costs, and sanctions imposed by the District Court.

_____
Signature of Inmate
Jerome Victor Trafny

United States District Court
for the
District of Utah
August 15, 2006

******MAILING CERTIFICATE OF THE CLERK******

RE: Trafny v. USA, et al
2:06cv00578 TC

Jerome Victor Trafny
#01187-081
USP ADELANTO
PO BOX 5500
ADELANTO, CA 92301

Prisoner Litigation Unit
US District Court, District of Utah

Cheryl L. Espinoza, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA Plaintiff v. DAVID L. BEAGLEY; ROBERTA A. BEAGLEY; DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION; UTAH COMMUNITY CREDIT UNION; and UTAH TAX COMMISSION, Defendants	ORDER FOR PRO HAC VICE ADMISSION Case Number: 2:06cv656

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Philip E. Blondin in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: this 13 day of August 2006.

Ted Campbell
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

KEITH CARNEY, Plaintiff, v. DR. RICHARD GARDEN et al., Defendants.	)))))))))	Case No. **O R D E R**

Plaintiff/inmate, Keith Carney, submits a *pro se* civil rights case.[1] Plaintiff applies to proceed without prepaying his filing fee.[2] However, Plaintiff has not as required by statute submitted "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the *6-month period immediately preceding the filing of the complaint* . . . obtained from the appropriate official of each prison at which the prisoner is or was confined."[3]

IT IS HEREBY ORDERED that Plaintiff's application to proceed without prepaying his filing fee is granted.

So that the Court may calculate Plaintiff's initial partial filing fee, IT IS ALSO ORDERED that Plaintiff shall have thirty days from the date of this Order to file with the Court a certified copy of his inmate trust fund account statement(s). If

[1]*See* 42 U.S.C.S. § 1983 (2006).

[2]*See* 28 *id.* § 1915.

[3]*See id.* § 1915(a)(2) (emphasis added).

Plaintiff was held at more than one institution during the past six months, he shall file certified trust fund account statements (or institutional equivalent) from the appropriate official at each institution where he was confined. The trust fund account statement(s) must show deposits and average balances for each month. If Plaintiff does not fully comply, his complaint will be dismissed.

DATED this 11th day of August, 2006.

BY THE COURT:

PAUL M. WARNER
United States Magistrate Judge

AO 94 (Rev. 8/97) Commitment to Another District

UNITED STATES DISTRICT COURT

Central District of UTAH

UNITED STATES OF AMERICA
V.
Shylynn Ellis

COMMITMENT TO ANOTHER DISTRICT

FILED IN UNITED STATES DISTRICT COURT DISTRICT OF UTAH
AUG 11 2006
By MARKUS B. ZIMMER, Clerk
DEPUTY CLERK

DOCKET NUMBER		MAGISTRATE JUDGE CASE NUMBER	
District of Arrest	District of Offense	District of Arrest	District of Offense
	Arizona	WA-06-256-M	

CHARGES AGAINST THE DEFENDANT ARE BASED UPON AN

☐ Indictment ☐ Information ☐ Complaint ☐ Other (specify) Alleged Violation of ~~Pretrial~~ Supr. Release

charging a violation of **U.S.C. §**

DISTRICT OF OFFENSE
District of Wyoming

DESCRIPTION OF CHARGES:

21: 846 and 841(a)(1) and (b)(1)(B)-Conspiracy to Possess with Intent to Distribute and to Distribute Methamphetamine

CURRENT BOND STATUS:

☐ Bail fixed at and conditions were not met
☐ Government moved for detention and defendant detained after hearing in District of Arrest
☐ Government moved for detention and defendant detained pending detention hearing in District of Offense
☐ Other (specify)

Representation: ☐ Retained Own Counsel ☒ Federal Defender Organization ☐ CJA Attorney ☐ None

Interpreter Required? ☒ No ☐ Yes Language:

DISTRICT OF Arizona

TO: THE UNITED STATES MARSHAL

You are hereby commanded to take custody of the above named defendant and to transport that defendant with a certified copy of this commitment forthwith to the district of offense as specified above and there deliver the defendant to the United States Marshal for that District or to some other officer authorized to receive the defendant.

11 August 2006
Date

United States Judge or Magistrate Judge

RETURN

This commitment was received and executed as follows:

DATE COMMITMENT ORDER RECEIVED	PLACE OF COMMITMENT	DATE DEFENDANT COMMITTED

DATE	UNITED STATES MARSHAL	(BY) DEPUTY MARSHAL

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

RONNIE LEE GARDNER, Petitioner, v. HANK GALETKA, Warden of the Utah State Prison, Respondent.	)	Case. No. 95-CV-846-C ORDER FOR TRAVEL AUTHORIZATION

Upon application of Andrew Parnes, IT IS HEREBY ORDERED that he has authorization to travel by air roundtrip from Hailey, Idaho, to Salt Lake City, Utah on August 18, 2006.

DATED: . aug 14, 2006

Tena Campbell
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SAUL SOTO-MELCHOR, Defendant.	ORDER OF RECUSAL Case No. 2:99-CR-415

I recuse myself in this criminal case, and ask that the appropriate reassignment card be drawn by the clerk's office.

Dated this 15th day of August, 2006.

BY THE COURT:

David K. Winder
Senior U. S. District Judge

Judge Ted Stewart
DECK TYPE: Criminal
DATE STAMP: 08/15/2006 @ 10:57:34
CASE NUMBER: 2:99CR00415 TS